

A

NEW LAW DICTIONARY

AND

Institute of the Whole Law.

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FOR THE USE OF STUDENTS, THE LEGAL PROFESSION,
AND THE PUBLIC.

BY

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"Nosse quæ nunc aguntur in curiis, necque præterita ignorare."

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P R E F A C E.

It appeared to the Author that a new Dictionary of the Law would be useful, if it succeeded in presenting a complete Institute of the whole Law of England, expressing briefly, but without inaccuracy or meagreness, the rules and principles of the Common Law, of Chancery Law, of Real Property or Conveyancing Law, of Mercantile Law, of Constitutional Law, and of Public or General, *i.e.*, International, Law, arranging these rules and principles, whether of doctrine, evidence, or procedure, in lexicographical order, and while giving prominence to what is modern, not ignoring what is ancient in the law, wherever the ancient principles or phrases were either valuable in themselves or serviceable in explaining the modern principles or phrases which are in numerous instances their equivalents. This scheme involving the observance of a double method, has not been very easy to carry through, but unsparing endeavours have been used towards accomplishing it. In the first place, it was manifest that if the dimensions of the Dictionary were to be convenient (and they were strictly limited to such convenience as was compatible with usefulness), much that was old and totally disused would have to be excluded altogether, and much more that was also old but not totally disused would have to be most succinctly expressed; and in the second place, it was manifest that the vast details of the modern law would have to be compressed to the maximum degree in order to admit of being comprised within the limits of the Dictionary. Then, in the third place, the iteration of matter, which was in danger of creeping in through the combination of Institute and Dictionary, had to be watchfully excluded, and this want of iteration compensated by proper references, neither too numerous to be puzzling, nor too scanty to be imperfect. Lastly, all that part of the modern law which could point to an historical origin deserved to keep the merit of its lineage or pedigree, and some pains have been taken to be just in this respect. A table of contents to a Dictionary (which one might suppose is all contents) is probably a phenomenon; but

such a table has been prefixed in the present case, and for a reason in keeping with the purpose and character of the Dictionary, that is to say, to serve as a synopsis to the Institute of the whole Law which is embodied in the Dictionary, and at the same time to classify the whole law under its distinct compartments, rendering every such compartment (as nearly as might be) a complete epitome of the law upon that particular head.

How far the Author may be found to have accomplished the purposes (as hereinbefore expressed) of this compilation, he must leave to the judgment of others; but without craving the indulgence of the public, whose servant he is, and to whom, therefore, if he serve up anything he should in all conscience serve up a proper dish, he is reluctant to acknowledge that an unaccustomed feeling of diffidence has once or twice assailed him, lest his work should not prove so absolutely faultless or so generally useful as it has been his wish to make it. But of one thing he is courageous, namely, of the service which his work will render to students preparing for the bar or for the lower branch of the profession. Of all persons who have to labour in the early hours of life, students of the law are probably the most deserving of compassion,—a compassion which should increase with each increasing year, inasmuch as Parliament is annually adding to the burdens of their already over-burdened shoulders. Surely, therefore, an Institute of the character that is here attempted should prove a welcome manual to such. The student's eye will also be materially assisted by the style in which the work is printed.

A. BROWN.

89, *Chancery Lane, W.C.*
October, 1874.

. *N.B.—The references to titles in the Table of Contents are to the Table of Contents, and the references to titles in the Body of the Dictionary are to the body of the Dictionary.*

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LIST OF BOOKS.

* * *The following is a list of the books which have been principally consulted in compiling this Dictionary, in addition to the few that are referred to in the body of the work. The list is classified under heads, which may perhaps serve the student or junior barrister in making up his own Law Library.*

I. COMMON LAW.

(A.) Law of Contract :

- Benjamin on Sales, 1 vol.
- Broom's Common Law, 1 vol.
- Byles on Bills of Exchange, 1 vol.
- Chitty on Contracts, 1 vol.
- Grant's Law of Banking, 1 vol.
- Kay on the Law of Shipmasters.
- Langdell's Contract Cases, 1 vol.
- " Cases on Sales, 1 vol.
- Leake on Contracts, 1 vol.
- Maude and Pollock on Merchant Shipping, 1 vol.
- Mayne on Damages, 1 vol.
- Russell on Arbitrations, 1 vol.
- Sedgwick on Damages, 1 vol.
- Selwyn's Nisi Prius, 2 vols.
- Smith's Leading Cases, 2 vols.
- " Mercantile Law, 1 vol.
- Williams's Personal Property, 1 vol.

(B.) Law of Torts :

- Addison on Torts, 1 vol.
- Broom's Common Law, 1 vol.
- Mayne on Damages, 1 vol.
- Sedgwick on Damages, 1 vol.

(C.) Law of Crimes :

- Archbold's Criminal Pleading, 1 vol.
- Greaves' Criminal Statutes, 1 vol.

(D.) Law of Evidence :

- Best on Evidence, 1 vol.
- Roscoe's Evidence at Nisi Prius, 1 vol.
- Roscoe's Criminal Evidence, 1 vol.
- Taylor on Evidence, 2 vols.

(E.) Law of Procedure :

- Adams on Ejectment, 1 vol.
- Archbold's Criminal Pleading, 1 vol.
- Brandon's Lord Mayor's Court, 1 vol.
- Brandon's Foreign Attachment, 1 vol.
- Browne's Probate Practice, 1 vol.
- " Divorce Practice, 1 vol.
- Bullen and Leake's Precedents in Pleading, 1 vol.

I. COMMON LAW—continued.

(E.) Law of Procedure—continued.

- Buller's Nisi Prius, 1 vol.
- Chitty's Forms, Q. B., &c., 1 vol.
- " Archbold's Practice, 2 vols.
- Cole on Ejectment, 1 vol.
- Davis's County Courts Practice, 1 vol.
- Day's C. L. P. Acts, 1 vol.
- Smith's Action at Law, 1 vol.

II. EQUITY LAW.

(A.) General Principles :

- Fisher on Mortgages, 2 vols.
- Fry on Specific Performance, 1 vol.
- Kerr on Discovery, 1 vol.
- " Fraud, 1 vol.
- " Injunctions, 1 vol.
- " Receivers, 1 vol.
- Lewin on Trusts, 1 vol.
- Lindley on Partnership, 2 vols.
- May on Fraudulent Conveyances, 1 vol.
- Smith's Manual of Equity, 1 vol.
- Snell's Principles of Equity, 1 vol.
- Spence's Equitable Jurisdiction, 2 vols.
- Sugden on Powers, 1 vol.
- Tudor's Leading Cases, Mercantile and Maritime Law, 1 vol.
- White and Tudor's Leading Cases, Equity, 2 vols.

(B.) Particular Subject Matters :

- Adams on Trade Marks, 1 vol.
- Bainbridge on Mines and Minerals, 1 vol.
- Brown on Fixtures, 1 vol.
- Buckley's Companies Acts, 1 vol.
- Cooke and Harwood's Charities, 1 vol.
- Copinger's Law of Copyright, 1 vol.
- Cross on Lien, 1 vol.
- Goddard on Easements, 1 vol.
- Godefroi's Railway Law, 1 vol.
- Hanson on Legacy and Succession Duty, 1 vol.
- Johnson on Patents, 1 vol.

II. EQUITY LAW—*continued*.(B.) Particular subject matters—*cont.*

Newton on Patents, 1 vol.

Tudor on Charities, 1 vol.

Yate Lee on Bankruptcy, 1 vol.

(C.) *Evidence*.

Best on Evidence, 1 vol.

Kerr on Discovery, 1 vol.

Roscoe's Evidence at Nisi Prius, 1 vol.

Taylor on Evidence, 2 vols.

Wigram's Interpretation of Wills, 1 vol.

(D.) *Procedure*.

Daniel's Chancery Forms, 1 vol.

" " Practice, 2 vols.
Davis's County Courts Practice, 1 vol.

Elmes's Practice in Lunacy, 1 vol.

Hunter's Suit in Equity, 1 vol.

Morgan's Chancery Acts and Orders, 1 vol.

Morgan and Davey's Costs in Chancery, 1 vol.

Pemberton on Supplement and Revivor, 1 vol.

Roche and Hazlitt on Bankruptcy, 1 vol.

Seton on Decrees, 2 vols.

III. REAL AND PERSONAL PROPERTY.

(A.) General Principles.

Burton's Compendium, 1 vol.

Dart's Vendors and Purchasers, 2 vols.

Elton on Copyholds, 1 vol.

Fawcett's Landlord and Tenant, 1 vol.

Jarman on Wills, 2 vols.

Platt on Leases, 2 vols.

Preston on Conveyances, 3 vols.

" Estates, 1 vol.

Scriven on Copyholds, 1 vol.

Shelford's Real Property Statutes, 1 vol.

Sheppard's Touchstone, 2 vols.

Smith's Real and Personal Property, 2 vols.

Sugden's Vendors and Purchasers, 1 vol.

Tudor's Leading Cases, Conveyancing, 1 vol.

Williams's Personal Property, 1 vol.

" Real Property, 1 vol.

" on Executors and Administrators, 2 vols.

Woodfall's Landlord and Tenant, 1 vol.

III. REAL AND PERSONAL PROPERTY—*cont.*

(B.) Forms in Conveyancing.

Copinger's Index, Conveyancing, 1 vol.

Crabb's Conveyancing, 2 vols.

Davidson's Conveyancing, 8 vols.

Frend and Ware's Railway Precedents, 1 vol.

Hayes' Concise Conveyancer, 1 vol.

" and Jarman's Forms of Wills, 1 vol.

Jarman's Powers of Attorney 1 vol.

Platt on Leases, 2 vols.

Prideaux's Conveyancing, 2 vols.

Woodfall's Landlord and Tenant, 1 vol.

IV. CONSTITUTIONAL LAW.

Broom's Constitutional Law, 1 vol.

Blackstone's Commentaries, 4 vols.

Forsyth's Constitutional Law, 1 vol.

Hallam's Middle Ages, 3 vols.

" Constitutional History, 3 vols.

May's Constitutional History, 3 vols.

" Parliamentary Practice, 1 vol.

Stubb's Constitutional History.

V. ROMAN LAW AND JURISPRUDENCE.

Austin's Jurisprudence, 2 vols.

Bentham, by Dumont, 3 vols.

Brown's Savigny on Obligations, 1 vol.

Gaius' Commentaries, 1 vol.

Justinian's Institutes, 1 vol.

" Digest and Code, &c., 8 vols.

Ortolan's Justinian, 3 vols.

VI. INTERNATIONAL LAW.

Clarke on Extradition, 1 vol.

Guthrie's Savigny's Private International Law, 1 vol.

Ortolan's Diplomatie de la Mer, 2 vols.

Westlake's Private International Law, 1 vol.

Wharton's International Law, 1 vol.

Wheaton's International Law, 1 vol.

" History of same, 1 vol.

Wolsey's International Law, 1 vol.

VII. GENERAL DIGESTS AND REPERTORIES.

Blackstone's Commentaries, 4 vols.

Chitty's Equity Index, 4 vols.

" Statutes, 4 vols.

Clark's House of Lords Digest, 1 vol.

Coke's Institutes, 6 vols.

" Reports, 6 vols.

Cruise's Digest, 6 vols.

Harrison's Digest, by Fisher, 5 vols.

Justinian's Digest, Code, &c.,

Law Reports' Digest.

Williams' Saunderson's Reports, 2 vols.

A NEW LAW DICTIONARY.

ABANDONMENT. This is a word of very general application, and bears in every instance of its use its natural or popular meaning. Thus, the abandonment of children, or their desertion and exposure, for the law as to which see *R. v. Falkingham* (L. R. 1 C. C. R. 222); also, the abandonment of a distress or of an execution, for the law as to which see titles **DISTRESS** and **EXECUTION**; also, the abandonment of the excess of a claim in order to give jurisdiction to the County Court, for the law as to which see **COUNTY COURT JURISDICTION**,—are so many uses of the word. For Abandonment in the law of Marine Insurance, see title **MARINE INSURANCE**; and see also two following titles.

ABANDONMENT OF LEGAL PROCEEDINGS. Such abandonment may either be *voluntary*, where the plaintiff does it of his own accord, or *compulsory*, where the defendant compels him either to abandon or to continue his action. The plaintiff may not voluntarily abandon his action, even although adverse, without first satisfying the defendant his costs (*Pugh v. Kerr*, 5 M. & W. 164). Under the C. L. P. Act, 1851, the application of the defendant to compel an abandonment is to be made on summons, s. 92. In case the plaintiff voluntarily abandons his action, he should give prompt notice thereof to the defendant, in order to save further costs. See *Pugh v. Kerr*, *supra*.

ABANDONMENT OF RAILWAYS. See Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 83), and the other Acts in Godfreid and Shortt's Law of Railway Companies.

ABATEMENT OF ACTIONS AND SUITS. As applied to actions or suits, this word denotes that for some cause or other the suit is become defective, and can no longer be proceeded with until such defect is removed. Various provisions have been made by recent statutes preventing or remedying such abatements,—of these provisions the principal are the following:—

1. C. L. P. Act, 1852, ss. 135–140, where the death of parties is or (but for that Act) would have been the cause of the abatement.

ABATEMENT OF ACTIONS AND SUITS

—continued.

2. O. L. P. Act, 1852, s. 141, where the marriage of a *feme sole* (party) is, or (but for that Act) would have been, the cause.

3. Bankruptcy Act, 1869, s. 80, for the case of bankruptcy, and—

4. Chancery Jurisdiction Amendment Act, 1852 (15 & 16 Vict. c. 86), s. 52, which enacts that upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability, such order to be served upon the successors in interest or liability, and (when the same is served, to have the effect of rendering such successors parties to the abated suit, with liberty nevertheless to discharge the order for sufficient cause assigned.

ABATEMENT OF NUISANCE. In the case of a public nuisance the party abating same must have sustained some particular or special damage from it, *i.e.*, some damage other than and besides the general inconvenience sustained by the public at large (*Mayor of Colchester v. Brook*, 7 Q. B. 539); but in the case of a private nuisance the party prejudiced may at once abate same (*Lonsdale (Earl) v. Nelson*, 2 B. & C. 302). However, the abatement must be made without any breach of the peace, and also without doing any unnecessary damage (*Roberts v. Rose*, 4 H. L. C. 163). Under the statute 18 & 19 Vict. c. 121, and the other Acts relative to the preservation of the public health, local authorities and their officers may abate nuisances in the manner mentioned in the Acts.

See also title **NUISANCE**.

ABATEMENT OF POSSESSION. This is that species of injury to real property which is committed when a stranger, upon the death of an owner in fee, enters upon and takes possession of the land in exclusion of the heir or devisee of such deceased owner.

See also titles DISSEISIN; INTRUSION.

ABATEMENT OF RENT. This is an agreement to accept a less sum for rent than that comprised in the original agreement. No parol agreement to make such an abatement is binding. *Levinge v. O'Brien*, 4 Ir. Jur. 22.

ABATEMENT OF WRIT. This is the defeat or overthrow of a writ. Thus, in stat. 11 Hen. 6, c. 2, the words are, that the justices shall cause the said writ to be abated and quashed. So in Staundf. P. C. 148, it is said that an appeal shall abate and be defeated by reason of covin or deceit.

ABATEMENT, PLEAS IN. These pleas, which are also called dilatory pleas, because they delay for the time the further progress of the suit, or action, or prosecution, are pleas of some matter not material to the merits of the proceeding, but technically necessary or proper; and as such they are opposed to pleas in bar or peremptory pleas. They occur either in civil or in criminal proceedings.

I. In civil proceedings.—They are the following:—

- (1.) To the jurisdiction of the Court;
- (2.) To the person of the plaintiff;
 - as that (a) he is an outlaw;
 - or (b) an alien;
 - or (c) an excommunicated person;
 - or (d) an attainted person, and such like;
- (3.) To the person of the defendant;
 - as that (a) he is privileged;
 - or (b) misnamed (misnomer);
 - or (c) misdescribed (addition);
- (4.) To the writ and action, and formerly—
- (5.) On account of certain events happening, namely,—
 - (a.) The demise of the sovereign, corrected by 1 Edw. 6, c. 7, and other subsequent statutes;
 - (b.) The marriage { of the } corrected
 - (c.) The death { parties } rected by C. L. P. Act, 1852, and Chancery Jurisdiction Act, 1852.

II. In criminal proceedings, they are, generally speaking, the same; but under the statute 7 Geo. 4, c. 64, s. 19, no indictment or information is to be abated for

ABATEMENT, PLEAS IN—continued.

misnomer, or *addition*, but the same shall be amended if the Court is satisfied by affidavit of the true name or description. See *Rex v. Shakespeare*, 10 East, 83.

Inasmuch as pleas in abatement are odious, they must be certain to every intent (2 Wms. Saund. 620), and must go so far as to specify the true mode of procedure (*Evans v. Stevens*, 4 T. R. 227); and the same rule holds good in criminal cases also (*O'Connell v. Reg.* (in error), 11 Cl. & F. 155). And so a plea in abatement for non-joinder of defendants should mention all the co-defendants who are not joined (*Crellin v. Calvert*, 14 M. & W. 11). Every such plea must also be verified by affidavit (4 & 5 Anne, c. 16, s. 11), otherwise the plaintiff may sign judgment (*Poole v. Pembrey*, 1 Dowl. 692); and such affidavit must be delivered with the plea, unless an extension of time be granted. The time for pleading is also very limited, being four days after declaration. *Ryland v. Wormwald*, 5 Dowl. 581.

Upon issue joined on a plea in abatement, the judgment, when for the plaintiff, may be of either of two kinds, namely,—

- (1.) Final, as when the issue is an issue of fact;
- (2.) Respondent ouster, as when the issue is one of law.

Large powers of amendment are, however, now given by the C. L. P. Acts, 1852 and 1854, in cases of the non-joinder or mis-joinder of parties; for which see titles MIS-JOINDER and NON-JOINDER.

Pleas generally, whether in bar or in abatement, must be pleaded in the following order, which is invariable, namely,—

- (i.) To the jurisdiction;
- (ii.) In abatement,
 - (a.) To the person (1) of the plaintiff, or (2) of the defendant,
 - (b.) To the count,
 - (c.) To the writ;
- (iii.) In bar of the action.

Pleading a plea in any one of these classes is a waiver of the right to plead in any of the preceding classes.

See also title PLEA IN BAR.

ABBAT, called also *Abbot*, was a spiritual lord, and an abbacy was the lordship with the revenues thereof and the spiritual duties attaching thereto. In England, abbats were either elective or presentative; and again some abbats were mitred, having episcopal authority, and not being themselves subject to the jurisdiction of any diocesan, but others were unmitred, and were subject to such jurisdiction. The mitred abbats alone were lords of parliament. It is supposed that there were twenty-seven such parliamentary abbats. All the abbacies are supposed to have been

ABBAT—*continued.*

founded between 602 and 1133. An abbat together with his monks formed a *convent*, and were a corporation. By statute 27 Hen. 8, c. 28, the lesser monasteries were abolished, and by statute 31 Hen. 8, c. 13, the larger ones were dissolved also.

ABDICATION. This is a renunciation of office by some magistrate or other person in office before the natural expiration thereof. Such a renunciation differs from a *resignation* of office, being usually pure and simple, whereas resignation is commonly in favour of some particular successor. James II. was considered to have abdicated the Crown in 1688.

ABDUCTION. This word is commonly used of the criminal offence of carrying off females on account of their fortunes. See statute 9 Geo. 4, c. 81; but the law is now comprised in 24 & 25 Vict. c. 100, ss. 53-4. And by the same statute (24 & 25 Vict. c. 100), s. 55, the unlawfully taking away any unmarried female under the age of sixteen years out of the possession and against the will of her parents or guardian is a misdemeanour; and under s. 56 of the same Act the like offence in respect of an unmarried female under the age of fourteen years is a felony.

ABETTERS: See title AIDERS AND ABETTERS.

ABEYANCE. This word as applied to real property, whether estates or dignities, denotes that the same are in expectation, remembrance, or intendment of the law. Abeyance is said to be of two sorts, being either—(1) Abeyance of the fee simple, or (2) Abeyance of the freehold. The first is where there is an actual estate of freehold *in esse*, but the right to the fee simple is suspended, and is to revive upon the happening of some event; e.g. in the case of a lease to A. for life, remainder to the right heirs of B. who is alive, the fee simple is in abeyance until B. dies (Co. Litt. 342 b.) Similarly, during the incumbency of each successive incumbent of a church, he having only a freehold interest therein, the fee simple is in abeyance (Litt. § 644-6.) The second species of abeyance, i.e. an abeyance of the freehold itself, occurs on the death of an incumbent, and until the appointment of his successor (Litt. s. 647.) But saving this one case, the freehold is never in abeyance, and cannot possibly be so.

It was customary in speaking of a thing in abeyance to say that it was "*in nubibus*" (which was rather a profane expression), or "*in gremio legis*" (*Carter v. Barnardiston*, 1 P. Wms. 516), the latter

ABEYANCE—*continued.*

phrase denoting that the fee simple or freehold which was in abeyance was meanwhile under the care or protection of the law.

There is no abeyance either of the fee simple or of the freehold in the case of conveyances operating under the Statute of Uses, for in these what is not given away remains in the grantor until it is so given.

ABILITY TO PAY. Before any one may be imprisoned at the present day under the 32 & 33 Vict. c. 62 (The Debtors Act, 1869), it is necessary (subject to the exceptions mentioned in s. 4 of the Act), that the debtor should have had since the date of the order or judgment the means to pay the sum in respect of which he has made default, s. 5 of the Act being substituted for ss. 98 and 99 of the County Court Act, 1846. Moreover, no imprisonment under this section is to operate as a satisfaction or extinguishment of any debt or demand, or cause of action, or to deprive any person of any right to take out execution against the lands or goods of the person imprisoned.

ABJURATION. This is a forswearing or renouncing upon oath. To abjure the realm was to take an oath to quit it for ever, and such abjuring persons were and are civilly dead. So also to abjure the Pretender was to take an oath disclaiming all allegiance or obedience to him. The oath of abjuration is a natural issue from the duty of allegiance, but, apparently, was not devised until after the Revolution of 1688, when the 7 & 8 Will. 3, c. 27, first imposed it in respect of temporal sovereigns at least. (See title PRÆMUNIRE, as to spiritual sovereigns.) More recently the oath of abjuration has been wrapped up in the oath of allegiance prescribed by the 21 & 22 Vict. c. 48, s. 1, which is in these words: "I, A. B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, &c., and I do faithfully promise to maintain, &c." the succession to the Crown as settled by the Act of Settlement, 1701 (12 & 13 Will. 3, c. 2), "hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm; and I do declare that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm." Under the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 9, the oath of allegiance leaves out the words of abjuration, being merely an expression of

ABJURATION—*continued.*

the positive duty of allegiance to the Queen.

Formerly, *i.e.*, in the time of Edward the Confessor, and the other succeeding sovereigns, down to the reign of James I., if a person committed a felony he might obtain sanctuary in a church or churchyard; and there on confession of the crime, he might abjure the realm. But this privilege, growing into an abuse, the thing was abolished by 21 Jac. 1, c. 28, since which statute this kind of abjuration has ceased. 2 Inst. 629.

ABORTION. Under the statute 24 & 25 Vict. c. 100, s. 58, any woman being with child who with intent to procure her own miscarriage, unlawfully administers to herself any poison, or uses any instrument with the like intent, and any person other than the woman doing for her the like (whether or not the woman is with child), is guilty of felony; and by s. 59, the person supplying such poison or instrument with knowledge of the intended unlawful use thereof, is guilty of a misdemeanor. For the complete commission of this offence, the earlier statutes of 43 Geo. 3, c. 58, and 9 Geo. 4, c. 31, s. 14, had required that the woman should be quick with child; but that is no longer a requisite. *R. v. Goodhall*, 2 C. & K. 293; *R. v. Isaacs*, 9 Cox, C. C. 228; Arch. Crim. Pl. and Evid. 711.

ABRIDGMENT. That is an epitome. The principal abridgments of the law are the following:—

- 1516. Fitzherbert's Abridgment, going down to 21 Henry VII.
- 1568. Brooke's "Grand Abridgment," going down to Elizabeth.
- Statham's Abridgment, going down to Henry VI.
- 1762. Comyns' Digest.
- 1786–51. Bacon's Abridgment.
- 1741–51. Viner's Abridgment.
- 1799–1806, with Supplement.
- 1853. Chitty's Equity Index, 3rd Ed.; and
- 1870. Harrison's Digest, by Fisher.

ABSCONDING DEBTOR. Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12, a bankrupt or liquidating debtor, who either after or within four months before the commencement of the bankruptcy or liquidation, quits England, and wrongfully takes with him property to the amount of £20 or upwards, is guilty of felony. And under the statute 33 & 34 Vict. c. 76, intitled "The Absconding Debtors Act, 1870," such a debtor may be arrested, notwithstanding the abolition of arrest on mesne process by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6.

ABSENCE. In French law, where a person has absented himself from his residence and domicile for four years, and nothing has meanwhile been heard of him, a declaration of absence may be obtained against him (*la déclaration d'absence*), one year after the parties have applied for same, failing the success of the inquiries for him that are officially directed upon such application. The effect of such a declaration is to put his next of kin (*héritiers présomptifs*), into possession of his property, they giving security, and distributing the property according to the will of the absent person, or (in the case of intestacy), according to law. In case the absentee returns home, the next of kin are accountable to him, and return him a fifth part of the income if he returns before fifteen years, and one-tenth part if after fifteen years and before thirty; if after thirty, they return no part at all, and cease to be accountable, their security being discharged. The consort of such an absentee may re-marry, and the second marriage is not impeachable excepting by the absentee (personally).

ABSENTING HIMSELF. This conduct, if done with the intention of avoiding one's creditors, is an act of bankruptcy sufficient to found an adjudication of bankruptcy within the meaning of the Bankruptcy Act, 1869, s. 6.

ABSQUE HOC (*without this*). These were formal words made use of in the conclusion of a special traverse, and the traverse itself was thence frequently called a traverse with an *absque hoc*. These words were not essential to a special traverse, others of a similar import being sometimes used in their stead; their object was directly to deny some proposition or averment set forth in the plaintiff's declaration. By the C. L. P. Act, 1852, s. 65, it is enacted that special traverses shall not be necessary in any pleading.

See SPECIAL TRAVERSE.

ABSTRACT OF TITLE. This is an epitome of the vendor's evidence of ownership. It should commence with a purchase deed or marriage settlement; and if it commences with a *will*, proof of the testator's seisin or possession, or at any rate of his receipt of the rents and profits at the time of his decease, should be furnished. If the abstract commences with a disentailing deed (or fine or common recovery), then the creation of the entail which purports to be barred thereby ought to be shewn. The abstract should set forth in epitome every subsequent document relating to or affecting the title, excepting leases which have expired, but not excepting mortgages, although the money has

ABSTRACT OF TITLE—continued.

been repaid, unless perhaps, where the mortgage was only equitable (*Drummond v. Tracy*, John. 608). But a deed which does not affect the right to sell need not be abstracted. When it is necessary (as it almost always is), to shew the birth, death, or marriage of any person, the proper certificates of these facts must be produced; when it is necessary to prove a pedigree, as where a descent occurs in the course of the abstract, then the heirships must be proved if possible by strict evidence, *i.e.*, by means of certificates of births, deaths, and marriages, and by the wills and letters of administration of persons having a possible prior title; but failing such proof, evidence of deeds, wills of relatives, extracts from parish books, from family Bibles, from tombstones, and such like, may be given. It should also be shewn that no outstanding interest requires to be got in, such as dower, freebench, curtesy, or any unsatisfied charge; also (in the usual case) that legacies charged on the land have been paid; also (if the property is sold free of land tax), the certificate of such redemption, together with the receipt and memorandum of registration, should be produced.

In the case of leasehold properties, the abstract should show the original lease and all subsequent assignments thereof, unless where the original lease is of very ancient date, when some of the mesne assignments may be left out. Also, when the lease is less than sixty years old, the lessor's title must be shewn.

When land (whether freehold or leasehold), has devolved upon any one by the death of another since the 19th of May, 1853, the payment of succession duty must be shewn.

By the Act 22 & 23 Vict. c. 35, s. 24, the wilful concealment of any document, or the falsification thereof, is a misdemeanour.

It is usual, however, to limit the contents of the abstract of title by special conditions of sale.

See title **CONDITIONS OF SALE**.

ABUTTALS (*abutters*). The buttings and boundings of land, either to the east, west, north, or south, shewing on what other lands or places it does abut. But strictly speaking, the sides on the breadth are properly *adjacentes*, *i.e.*, lying or bordering, and only the ends on the length are *abutantes*, *i.e.*, abutting or bounding. Cowel.

The importance of a careful statement of the abutments in describing the parcels in conveyancing consists in the facility thereby afforded of establishing the identity of the lands or plots of land sold, at

ABUTTALS—continued.

almost any distance of time. Also, in criminal law, in indictments for those offences which the law regards as being of a local character, an accurate description is necessary, and this is often best given by abutments. Thus, an indictment for not repairing a highway must specify the situation of the road within the parish; also, on an indictment for night poaching, the *locus in quo* must be described either by name, ownership, occupation, or *abutments*, and it would not be sufficient to describe it as a certain close in the parish of A. And by the rules of pleading (H. T. 16 Vict. r. 18) in an action of trespass *quare clausum fregit*, the close must be designated in the declaration by name or *abutments*, or other description, to avoid on the one hand the necessity of the defendant's pleading *liberum tenementum*, and on the other hand the necessity of the plaintiff's new assigning. Taylor on Evidence, 268, 327.

ACCEPTANCE. When a bill is drawn by A. B. upon C. D., and C. D. writes the word "accepted" and his name across the face of the bill, the bill becomes his acceptance. Such an acceptance is usually made by C. D. when he holds goods consigned to him by A. B. and not yet paid for, or when he is otherwise in debt to A. B. When he accepts it under other circumstances, the acceptance is for the accommodation or honour of the drawer. An acceptance by E. F., who is not a party to the bill, would also be an acceptance for honour or accommodation, but in this case, for that of the drawee. Every acceptance must since 1 & 2 Geo. 4, c. 78, s. 2, be on the bill,—a requisite which by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 6), is extended to a foreign bill as well as an inland one. An acceptance may be either *general*, as where the word "accepted," either alone or with the words "payable at" a particular place is written on the bill, or it may be *special*, as where the words "and not elsewhere" are added to the particular place mentioned in the acceptance for payment. For the general law as to the liability of an acceptor, see title **BILLS OF EXCHANGE**.

ACCEPTANCE AND RECEIPT. The acceptance which is intended by the Statute of Frauds must either precede or be contemporaneous with the receipt of the goods, and as there can be no receipt without delivery, it follows that the acceptance must be separated from the receipt by the delivery, thus,—1, acceptance; 2, delivery, and 3, receipt. Consequently the acceptance signifies a mere expression of one's selection of the particular goods or article.

ACCEPTANCE AND RECEIPT—contd.

Upon the goods being delivered and received, the purchaser if dissatisfied with those sent may return them; consequently the acceptance and receipt which the statute speaks of does not preclude subsequent objection.

ACCESS: See title **BASTARD**.

ACCESSARY. A person guilty of a felonious offence, not by being the actor, or actual perpetrator, of the crime, nor by being present at its performance, but by being some way concerned therein, either before or after its commission. If he has been concerned in it before its commission he is termed an accessory before the fact; if after, an accessory after the fact. An accessory before the fact is defined to be one who, being absent at the time the crime is committed, yet procures, counsels, or commands another to commit it; and, in this case, absence is necessary to constitute him an accessory, for if he be present, he is guilty of the crime as principal. Thus if A. advises B. to kill another, and B. does it in the absence of A., in this case B. is principal and A. accessory to the murder. An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; and generally any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes such assister an accessory, as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or using open force and violence to rescue or protect him (2 Hawk. P. C. 316, 317, 318). And now by stat. 24 & 25 Vict. c. 94, s. 1, it is enacted, that whoever shall become an accessory before the fact to any felony, may be indicted, tried, convicted, and punished in all respects as if he were the principal felon. And by sect. 3 of the same statute, it is enacted, that whoever shall become an accessory after the fact to any felony, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished. And see generally the last-mentioned Act, which is intitled "An Act to consolidate and amend the Statute Law of England and Ireland relating to Accessaries to and Abettors of Indictable Offences."

ACCESSARY—continued.

To a misdemeanour there are no accessaries, as neither is there to the offence of high treason.

See also title **AIDERS AND ABETTERS**.

ACCESSIO. This is a term in Roman law used to denote a mode of acquisition of property by natural means; and the like use of the word is not uncommon in English law. Thus, the maxim "*accessio cedit principali*" denotes generally that an accessory thing when annexed to (as it naturally is annexed to) a principal thing becomes part and parcel of the latter, and thereupon and thereby becomes the property of the owner of the principal thing. This mode of acquisition is particularly illustrated by the Law of Fixtures, as well in English as in Roman law, the maxim of the English law being "*Quidquid plantatur solo, solo cedit*," and of the Roman law being "*Omne quod inædificatur solo, solo cedit*." (See Brown on Fixtures, 2nd ed. 1872.) But the principle is of universal application, applying to the incorporation of any substance of minor importance in, or its addition to, another substance of a larger or principal importance. By many civilians it is used as the general term, including in it the various more particular natural modes of acquisition, which are designated respectively *Alluvio*, *Specificatio*, *Confusio*, *Commixtio*. See these several titles.

ACCIDENT. This is any unforeseen event that is not attributable to the contrivance or negligence of the party. It is a rule of all systems of jurisprudence that no one is liable for an accident, being purely such (*Wakeman v. Robinson*, 1 Bing. 213; 8 Moore, 63); but it is an equally universal rule, that the slightest negligence will exclude the defence of accident (*Kearney v. London, Brighton, &c. Ry. Co.*, L. R. 5 Q. B. 411). But this non-liability from accident does not, of course, protect the purchaser of a specific chattel from payment of the price, in case the chattel is either injured or destroyed by accident. *Tarling v. Baxter*, Tudor's M. C. 596.

The Courts of Equity go further than the Courts of Law, and attempt even to relieve parties against the consequences of accident, but within a limited group of cases only. Thus, if a party has, to begin with, a conscientious title to relief, then if the accident consists in the loss of a bond, or of a negotiable or non-negotiable instrument, the Court of Chancery will assist him to getting paid, upon the one condition of his giving a bond of indemnity to the obligor against any possible second payment; but the Courts of Law also have now

ACCIDENT—*continued.*

acquired jurisdiction to give relief in such cases upon the like condition, 17 & 18 Vict. c. 125 (O. L. P. Act, 1854). Equity will also occasionally relieve in the case of a lost deed (*Dalston v. Coatworth*, 1 P. Wms. 731). With reference to a destroyed instrument, whether the same is negotiable (*Wright v. Maidstone*, 1 K. & J. 708) or non-negotiable (Byles on Bills, 372), Equity seems to give no relief, inasmuch as the Law can do so. *Sed quare*, *Hansard v. Robinson*, 7 B. & C. 95.

The Courts of Equity will also relieve against the defective execution of a power, but that only in favour of a purchaser (including a mortgagee or lessee), or of a creditor, or of a wife, a child, or a charity. They also relieve against mistaken payments by an executor, decreeing, for example, the residuary legatees or next of kin to make up, i.e., refund, to an annuitant-legatee the diminution which the annuity fund may have sustained through a reduction in the value of stock, occasioned by Act of Parliament.

But the Court refuses to extend its relief to cases of contract, for there the parties have been to some extent negligent in not providing against the particular casualty, e.g., the destruction of premises leased (*Bullock v. Dommitt*, 6 T. R. 650); and the relief which the Court gives to one party will never be given so as to prejudice another. *White v. Nutts*, 1 P. Wms. 61.

ACCIDENTAL DEATH. For the law of compensation in the case of persons killed by railway accidents, see Lord Campbell's Act (9 & 10 Vict. c. 93); also the Act amending same (27 & 28 Vict. c. 95). By the latter Act any of the persons beneficially interested in the death may, when no action for compensation is brought within six months from the death by the executor or administrator of the deceased, bring such action; and the defendant is enabled to pay a lump sum of money into Court, without specifying the shares into which the same is to be divided among the parties interested.

ACCIDENTS, INSURANCE AGAINST. The law of insurance in its general principles is applicable to this particular species of insurance. Thus, the assuring person must have an interest in the life of the assured, under the stat. 14 Geo. 3, c. 48, s. 2 (*Shilling v. Accidental Death Insurance Co.*, 2 H. & N. 42). Also, there must be a full disclosure of all circumstances material to the exposure to accidents (*Shilling's Case*, *supra*). It is usual in such policies to provide that the injury from the accident insured against shall be caused by some outward and visible means,

ACCIDENTS, INSURANCE AGAINST—*continued.*

of which satisfactory proof can be furnished to the company; as to the meaning of such a provision, see *Trew v. Railway Passengers Insurance Company*, 5 H. & N. 211; on app. 6 H. & N. 839. And see generally Fisher's Dig. 4926-30.

ACCOMMODATION: See title **BILLS OF EXCHANGE**.

ACCOMPLICE: See title **AIDERS AND ABETTORS**.

ACCORD AND SATISFACTION. This is a defence in law, consisting (as the name imports) of two parts; viz. something given or done to the plaintiff by the defendant as a satisfaction, and agreed to (or accorded) as such by the plaintiff. Therefore accord without satisfaction is not a good plea (*Parker v. Ramabottom*, 3 B. & C. 257), as neither is satisfaction without accord (*Hardman v. Bellhouse*, 9 M. & W. 596); but accord and satisfaction with one of several enures to the benefit of all (*Wallace v. Rensall*, 7 M. & W. 264; *Nicholson v. Revell*, 4 A. & E. 675). But the satisfaction must be complete and executed. *Flocton v. Hall*, 16 Q. B. 1039.

In the case of an ascertained sum of money, a less sum is no satisfaction for the debt unless there is some additional consideration (*Fitch v. Sutton*, 5 East, 230; *Cumber v. Wane*, 1 Sm. L. O., 6th ed. 301); but in other cases the value of the satisfaction is not inquired into (*Pinnel's Case*, 5 Rep. 117a; *Curlewis v. Clark*, 3 Exch. 375); excepting so far as to ascertain that the chattel given in satisfaction is of some value (*Preston v. Christmas*, 2 Wils. 86; *Cartwright v. Cook*, 3 B. & Ad. 701). One security is no satisfaction for another, unless it is of a higher or better quality than the original security; e.g., by being negotiable. *Sibree v. Tripp*, 15 M. & W. 23.

After breach, accord and satisfaction is in general a good defence (when specially pleaded) to an action on any contract, whether made by parol or by specialty (*Blake's Case*, 6 Rep. 43 b); unless where a sum certain is payable under the specialty (*Peytoe's Case*, 9 Rep. 79a); but before breach it is never a good defence to an action on a specialty "*nam unumquodque eodem modo quo colligatur dissolvi debet*."

An accord and satisfaction obtained by fraud may be set aside in equity (*Stewart v. Great Western Ry. Co.* 2 De G. J. & S. 319); and a receipt given for money received as compensation under circumstances amounting to imposition, or even undue consideration, will not estop the injured party even at Law (*Roberts v. Eastern Counties Ry. Co.* 1 F. & F. 460;

ACCORD AND SATISFACTION—contd.

Lee v. Lancashire and Yorkshire Ry. Co.,
L. R. 6 Ch. App. 527.

ACCOUNT (ACTION OF). An action which lies against a party to compel him to render an account to another with whom he has had transactions; and the writ by which this action was commenced was thence termed a writ of account (*F. N. B.* 116 to 119; *Co. Litt.* 172 a). From the greater facilities, however, which are afforded by the Courts of Equity in taking an account of profits or receipts, the action of account at law is now seldom resorted to, one of the most recent cases in which it was used being *Beer v. Beer* (12 C. B. 2). The action may still, however, be brought in a proper case; for by the common law, it lies against a bailiff or receiver; also, against one merchant at the suit of another for not rendering a reasonable account of profits; and by the stat. 4 Anne, c. 16, s. 27, it is made to lie by one joint tenant or tenant in common against the other as bailiff (although not expressly so appointed) for receiving more than comes to his just share or proportion. This action as between merchants and merchants was an exception to the Statute of Limitations (21 Jac. 1, c. 16, s. 3), but since the *M. L. A. Act*, 1856 (19 & 20 Vict. c. 97), s. 9, it is no longer so, the limit for bringing the action being now six years in all cases.

The equitable jurisdiction in account applies in the following cases:—(1.) Where a principal asks for an account against his agent, there existing in this case a fiduciary relation between the parties (*MacKenzie v. Johnston*, 4 Mnd. 373), but not in the converse case of agent against principal (*Padwick v. Stanley*, 9 Hare, 627) (2.) Where there are *mutual accounts* between plaintiff and defendant; i. e., when each of two parties has *both received and paid* on the other's account (*Phillips v. Phillips*, 9 Hare, 471). And (3.) where the accounts are of a very complicated character, and therefore not admitting of being examined on a trial at Nisi Prius. *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

ACCOUNTANT TO THE CROWN. This denotes generally one who receives money for the Crown, and is accountable therefor. The Crown has a lien upon the lands (other than the copyhold lands) of the accountant for any moneys he may misapply or become chargeable with, and such lien attaches as from the time he becomes such accountant, and continues to attach, even as against purchasers of the lands without notice (*Coxhead's Case*, *F. Moore*, 126). Since June 4th, 1839, every such lien of the Crown must be registered under 2 & 3 Vict. c. 11, and under the Act 22 &

ACCOUNTANT TO THE CROWN—contd.

23 Vict. c. 35, must be re-registered every five years; but since 1st November, 1865, no future lien is to affect a purchaser, although with notice, until a writ of execution has been registered, under 28 & 29 Vict. c. 104.

See title CROWN DEBTS.

ACCOUNTANT-GENERAL. This was an officer of the Court of Chancery, appointed by the statute, 12 Geo. 1, c. 32, but who has since been superseded by an officer called the Paymaster General of England, under the Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), and the Chancery Fund Rules, 1872, which came into operation on the 7th January, 1873.

See title PAYMASTER-GENERAL.

ACCOUNTS CURRENT. These are running accounts, or open accounts.

ACCOUNT STATED. This is nothing more than the admission of a balance due from one party to another; and that balance being due there is a debt; and the statement of the account implies a promise in law to pay the debt shewn by the balance. For an account stated, it is requisite that a sum certain should be due in certainty (*Hughes v. Thorpe*, 5 M. & W. 656); but the sum need not be payable in *presenti* (*Wheatley v. Williams*, 1 M. & W. 533). The account must have been stated to the creditor himself or his agent, and is not sufficient if made to a stranger (*Tucker v. Barrow*, 7 B. & C. 623). The statement may be in writing or by word of mouth (*Singleton v. Barrett*, 2 C. & J. 368); an *L. O. U.* is evidence of an account stated (*Jacobs v. Fisher*, 1 C. B. 178). But to revive debts barred by statute, the account stated must be in writing, 9 Geo. 4, c. 14, s. 1.

An account stated is not conclusive, but an error therein may be shewn (*Thomas v. Hawkes*, 8 M. & W. 140); also, that an item therein is not a valid debt for want of consideration (*French v. French*, 2 M. & G. 644). It is, however, no objection to a debt that it arose upon a contract which was bad for want of writing within the Statute of Frauds (*Cocking v. Ward*, 1 C. B. 858), unless the contract has continued executory. *Lord Falmouth v. Thomas*, 1 C. & M. 89.

It is a rule of law, that an infant cannot state an account (*Trueman v. Hurd*, 1 T. R. 40); upon attaining his age of twenty-one years he may, however, ratify such an account. *Williams v. Moor*, 11 M. & W. 256.

ACCRETION. A mode of acquisition by natural law.

See title ACCESSION.

ACCRUER, CLAUSE OF. This is an express clause frequently occurring in the case of gifts by deed or will to persons as tenants in common, providing that upon the death of one or more of the beneficiaries his or their shares shall go to the survivors or survivor. It is a rule of law, that there is "no survivorship upon survivorship;" i.e. that the clause of accruer extends only to the original, not also to the accrued, shares, unless in terms it is expressly made to extend to the latter also, which it customarily is made to do. *Pain v. Benson*, 3 Atk. 80.

ACCUMULATIONS. The rule which limits the accumulation of the income of property used to be the rule of perpetuities, viz., a life or lives in being, twenty-one years, and (where gestation actually existed) the period of gestation (*Cadell v. Palmer*, 1 Cl. & F. 372); but, in consequence of the supposed abuse of that rule in *Thellusson v. Woodford*, 4 Ves. 112, and by virtue of the so-called Thellusson Act (39 & 40 Geo. 3, c. 98), the period within which such accumulation may at the present day be lawfully directed is one or other severally, and not two or more together, of the following periods, namely:—

- (1.) The life of the grantor;
- (2.) The term of twenty-one years from the death of such grantor, or (but in the case of a will only) from the death of the testator;
- (3.) The minority or minorities of any life or lives in being, or *in ventre*, at the death of such grantor or of such testator (as the case may be);
- (4.) The minority or minorities of any person or persons who, under the deed or will (as the case may be), is entitled to the income, or rather would if of full age, and but for the direction to accumulate, be entitled thereto.

The Thellusson Act applies both to real and to personal property; also, whether the direction to accumulate is given expressly in so many words, or arises by implication only (*Macdonald v. Bryce*, 2 Keen, 276), taking place by operation of law, and without regard to the question whether the accumulation, when it arises from an implied direction, takes place accidentally or necessarily (*Evans v. Hellier*, 5 Cl. & F. 114), and also without regard to the question whether the interests of takers are vested or not. *Shaw v. Rhodes*, 1 My. & Cr. 185.

The direction to accumulate is, in the general case, void as to the excess only (*Marshall v. Holloway*, 2 Sw. 450); but where the direction exceeds not only the limit prescribed by the Thellusson Act, but also the rule of perpetuities, it is void

ACCUMULATIONS—continued.

in toto, and not merely as to the excess. *Boughton v. James*, 1 Coll. 26.

The Thellusson Act directs that the income directed to be accumulated shall, so far as the direction is void for excess, belong to the person or persons who "would have been entitled thereto if such accumulation had not been directed;" and the statute, in this part of it, has been construed as follows:—

I. As to realty,—

- (1.) If there is no residuary devise the heir takes (*Eyre v. Marsden*, 2 Keen, 564); and in case of his death during the period of excess, the future income will go;
 - (a.) In the case of the heir having taken a chattel interest, to his next of kin (*Sevell v. Denny*, 10 Beav. 315); and
 - (b.) In the case of the heir having taken a freehold interest, to his next of kin (1 Vict. c. 26, s. 6), as being at the best an interest *pur autre vie* only;
- (2.) If there is a residuary devise the residuary devisee takes. 1 Vict. c. 26, s. 25.

II. As to personalty,—

- (1.) If there is no residuary bequest the next of kin take;
- (2.) If there is a residuary bequest the residuary legatee takes (*Haley v. Bannister*, 4 Madd. 275), and takes as capital, to which, therefore, if tenant for life, he would be entitled to the income of it only (*Crawley v. Crawley*, 7 Sim. 427); and

III. As to realty and personalty equally.

If the income directed to be accumulated is the income of residue, then,

- (1.) So far as the residue consists of personal estate the next of kin take (*Pride v. Fooks*, 2 Beav. 430); but
- (2.) So far as the residue consists of real estate the heir takes. *Wildes v. Davies*, 1 Sm. & Giff. 475.

The Thellusson Act itself excepts from its operation the following directions, namely:—

- (1.) Provisions for the payment of the debts, whether of the settlor or testator (as the case may be), or

ACCUMULATIONS—continued.

of any other person (*Barrington v. Liddell*, 2 De G. M. & G. 480); and such provisions are also exempt from the rule of perpetuities (*Briggs v. Oxford (Earl)* 1 De G. M. & G. 363);

- (2.) Provisions for raising *portions*, whether given by the same instrument or by a different one (*Beech v. Lord St. Vincent*, 3 De G. & Sm. 678), the parents of the portionists taking, however, some interest under the instrument which directs the accumulation (*Barrington v. Liddell, supra*), however small that interest may be (*Erans v. Hellier*, 5 Cl. & F. 126), the interest of the parents taking analogously to the rule of perpetuities, *semble*;

- (3.) Provisions for raising a timber fund, provided such provisions do not exceed the rule of perpetuities. *Ferrand v. Wilson*, 4 Hare, 344.

ACCUMULATIVE JUDGMENT. The passing distinct sentences for two or more distinct offences. By the Common Law such a judgment could only be given in cases of misdemeanours, and not upon convictions for felony, the party attainted of felony becoming thenceforth dead in law. Latterly, however, by stat. 7 & 8 Geo. 4, c. 28, s. 10, the Court was empowered to pass a second sentence, to commence after the expiration of the first, in a case of felony; and under the criminal statutes at present in force (24 & 25 Vict.) such accumulative punishments are in general use, not exceeding three in all.

See titles PERJURY; LARCENY.

ACCUSED. This is the generic name for the defendant in a criminal case, and is more appropriate than either prisoner or defendant. *Rez v. M'Naughten*, 1 C. & K. 131.

AC ETIAM BILLÆ. The *ac etiam* clause was a form or fiction of law adopted first in the Queen's Bench, and afterwards in the Common Pleas, to give jurisdiction to these Courts in actions for ordinary debts. The bill of Middlesex in the Queen's Bench being framed only for actions of trespass; and the statute, 13 Car. 2, st. 2, c. 2. having required that the true cause of action should be expressed in the writ or process, the Court of Queen's Bench was in danger of losing its entire jurisdiction in matters of debt; to obviate that result, the *ac etiam* clause was invented. And some few years afterwards, North, C.J., directed that in the Common Pleas the like fiction should be added to the usual complaint of break-

AC ETIAM BILLÆ—continued.

ing the plaintiff's close. But since the Uniformity of Process Act (2 Will. 4, c. 39) the necessity for this fiction has ceased.

ACKNOWLEDGMENT MONEY. A sum of money paid by copyhold tenants in some parts of England on the deaths of their landlords as an acknowledgment of their new lords. It is the *laudemum*, or *laudativum* of Roman law, being so called a *laudando domino*. Leominster used to be an instance of it, see Cowel; but there is no trace of it at Leominster at the present day. The author is not aware of any district in England in which it is now payable. The payment of fines by copyhold tenants is, however, an analogous payment.

ACKNOWLEDGMENT OF A DEBT. This consists in the admission that a debt is owing. Its effect upon a debt not yet barred by the Statute of Limitations is to cause the statutory period to commence running anew. The acknowledgment must be in writing under Lord Tenterden's Act (9 Geo. 4, c. 14), s. 1, and must be addressed to the creditor, or, *semble*, his agent (*Fuller v. Redman*, 26 Beav. 614); it may be signed either by the debtor himself or his agent (19 & 20 Vict. c. 97 s. 13). The acknowledgment, in order to be sufficient, must involve a promise to pay (*Tanner v. Smart*, 6 B. & C. 602); therefore the effect of a sufficient acknowledgment of a debt already actually barred is the same as the acknowledgment of a debt not yet barred, *i.e.*, the time will run afresh from the last acknowledgment.

ACKNOWLEDGMENT OF MARRIED WOMEN: See titles DEED ACKNOWLEDGED; FINE AND COMMON RECOVERY.

ACKNOWLEDGMENT OF TITLE. Under the stat. 3 & 4 Will. 4, c. 27, s. 14, a written acknowledgment of the title of a person entitled to any land, when given to him or his agent, and signed by the party in possession or in receipt of the rents and profits of the lands, has the effect of rendering such possession or receipt that of the person whose title is acknowledged; and the title of the latter to make an entry or to bring an action for the recovery of the lands shall be deemed to accrue at the date of such acknowledgment for the purpose of saving the Statute of Limitations.

ACQUIESCENCE. Where a person having a full knowledge of the facts (*Ramsden v. Dyson*, 1 H. L. C. 129) neglects to dispute the right of another, he is said to acquiesce in such right. The effect of such acquiescence is a species of *estoppel by conduct*, see title ESTOPPEL; and it is one of the principal grounds upon which Courts of

ACQUIESCENCE—continued.

Equity and also of Law rely in refusing relief to persons bringing forward their claims. The Courts of Equity carry this principle so far that in a matter of purely equitable jurisdiction they refuse relief to a plaintiff although he is within the period allowed by the Statutes of Limitation for the recovery of his rights. (See also title *LACHES*.) And when a person stands by and allows another to deal with property to which he claims or has a right, he is prevented from disputing the right of such other person, at least to the prejudice of a purchaser for value without notice (*Teasdale v. Teasdale*, Sel. Ch. Ca. 59). For the effect of acquiescence on the part of a landlord in avoiding the effect of a forfeiture for breach of covenant by his tenant, see title *WAIVER*.

ACQUITTAL. This word has two meanings. 1. It signifies to be free from enticings and molestations of a superior lord for services issuing out of lands. 2. It signifies a deliverance or setting free of a person from a charge or suspicion of guilt.

ACQUITTANCE. A discharge in writing of a sum of money or other duty is so called. Such a discharge, unless it is by deed, is not pleadable, neither is it conclusive as evidence, for it may be shewn to have been given through mistake. A duly authorized agent may sign an acquittance so as to bind his principal.

ACT OF BANKRUPTCY. This phrase denotes any one of the various grounds upon which a debtor may be adjudicated a bankrupt. Under the Bankruptcy Act, 1869, s. 6, these acts of bankruptcy are the following:—

- (1.) A general conveyance or assignment by the debtor in trust for his creditors;
- (2.) A fraudulent conveyance or transfer by the debtor of the whole or part of his property;
- (3.) The debtor's having done any of the following things with intent to defeat or delay his creditors, namely:
 - (a.) Departed out of England;
 - (b.) Remained out of England;
 - (c.) Being a trader, departed from his dwelling-house;
 - (d.) Begun to keep house; or,
 - (e.) Suffered himself to be outlawed;
- (4.) The debtor's having filed in Court a declaration of his inability to pay;
- (5.) The levying of an execution for not less than 50*l.* against the debtor by seizure and sale of his goods;
- (6.) The debtor's having neglected, if a trader for seven days, and if not a

ACT OF BANKRUPTCY—continued.

trader for twenty-one days, after service thereof to pay or to secure or compound for the amount (not being an amount under 50*l.*) demanded on the debtor's summons of the petitioning creditor.

ACT OF GOD. This is a pious phrase for an inevitable accident. No one is to be prejudiced by the *act of God*. But when a debtor has agreed to an alternative obligation, and one of the alternatives becomes impossible by the act of God, he is not thereby discharged from doing the other, which remains possible (*Barkworth v. Young*, 4 Drew. 1); for that is no prejudice to him, and the contrary would be a prejudice to the creditor.

See also title *IMPOSSIBILITY*.

ACT OF PARLIAMENT: See title *STATUTE*.

ACTES. In French law, denotes documents, e.g., *les actes de l'état civil*—public documents. Compare the use of *acta* in Roman law, and the phrase *Acts of Parliament* in English law.

ACTES DE DÉCÈS. In French law, are the certificates of death, which are required to be drawn up before any one may be buried. (*Aucune inhumation ne sera faite sans une autorisation de l'officier de l'état civil.*—Code Nap. i. 2-4.)

ACTES DE MARIAGE. In French law, are the marriage certificates, and contain names, professions, ages, and places of birth and domicile of the two persons marrying and of their parents; also the consent of these latter, and the mutual agreements of the intended husband and wife to take each other for better and worse, together with the usual attestations.

ACTES DE NAISSANCE. In French law, denote the certificates of birth, and must contain the day, hour, and place of birth, together with the sex and intended Christian name of the child, and the names of the parents and of the witnesses.

ACTIO NON ACCREBIT INFRA SEX ANNOS. In the times of Latin pleading, this was the phrase by which a defendant pleaded the Statute of Limitations to an action of *assumpsit* or on other simple contract, six years being the period limited for bringing the action.

ACTION AND SUIT. This is defined as the right of recovering in a Court of justice what is due or owing to oneself (*jus persequendi in judicio quod sibi debetur*).

All actions arise either out of contract or

ACTION AND SUIT—continued.

out of tort; if a proceeding originates out of a crime it is not (in English law, at any rate) an action, but a prosecution. The varieties of the several actions are the following:—

I. On contract,—

- (1.) Covenant, being on a deed alone;
- (2.) Assumpsit,—being on a simple contract only;
- (3.) Debt,—being indifferently on a deed or a simple contract;
- (4.) *Scire facias*,—being on a judgment;
- (5.) Account; and
- (6.) Annuity.

II. On tort,—

- (1.) Trespass,—being either
 - (a.) Trespass *quare clausum fregit*,—to real property;
 - (b.) Trespass *de bonis asportatis*,—to personal property;
- (2.) Case,—
- (3.) Trover,—
- (4.) Detinue,—and
- (5.) Replevin.

For a particular explanation of each of these forms of action, see the respective titles.

There were also a numerous group of actions called real and mixed actions, but all of these, saving *ejectment* only, have been abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36, and the C. L. P. Acts, 1852, 1854, and 1860.

There are certain general principles that are applicable to all actions and suits. Thus, first, it is necessary before commencing an action to see that the cause of action is complete, and, therefore, in the case of payments due against a certain day to see that the day has arrived and is over, and in the case of payments to become due only upon the performance of some condition to see that such condition has been performed, otherwise, if there was no cause of action at the date of the issuing of the writ of summons whereby the action is commenced, the plaintiff must necessarily fail. Secondly, it is necessary, especially in actions growing out of contracts, to see that the plaintiff has that privity which is necessary to support the action and as against the particular defendant, otherwise the action will be demurrable (*Lumley v. Gye*, 2 E. & E. 216). Thirdly, in the case of torts, the ground of action must be what the law regards as an *injuria* and not a *damnum* merely (*Stevenson v. Newnham*, 13 C. B. 285; *Acton v. Blundell*, 12 M. & W. 324). Fourthly, that the wrongful act does not amount to a felony (*Wellock v. Constantine*, 2 H. & C. 146). And, fifthly, in case of the *injuria* being the breach of a public duty, private damage

ACTION AND SUIT—continued.

must have arisen to the plaintiff from it. *Kearns v. Cordwainers Co.*, 6 C. B. 388.

See also following titles, JOINDER OF CAUSES; CONSOLIDATION RULE; PARTIES; CROSS ACTIONS, &c.

AD DAMNUM. That part of the declaration which commences with the words "to the damage," &c., is termed the breach, and is thence sometimes called the breach *ad damnum*. Ch. on Pleading, 362, 6th ed.

ADDITION. This term is used in law to denote the address and profession of the party to, or of any deponent in an action. The greatest accuracy in the addition is often necessary, *e.g.*, in the affidavit which is to accompany the registration of a bill of sale.

ADELING, otherwise **ATHELING**. An expression which was used to designate among the Saxons their chief nobility, and pre-eminently the eldest son of the king. Spelman.

ADEMPITION. The taking away. For the application of this word to legacies and devises, and for the English and Roman law of ademption of legacies, see title LEGACIES AND DEVISES.

AD INQUIRENDUM. A judicial writ commanding inquiry to be made of anything relating to a cause depending in the King's Courts. It is granted upon many occasions for the better execution of justice. See title WRIT OF INQUIRY.

ADJOURNMENT. A putting off until another time or place. Thus, a Court may be adjourned; Parliament is adjourned; the further consideration or hearing is adjourned; and in consequence of such adjournment, the parties and witnesses have permission to forbear their attendance during the period of adjournment. See as to Adjournment Days, *Cheetham v. Sturtevant*, 12 M. & W. 615.

ADJUDICATION. A giving of judgment. In Roman Law, the *adjudicatio* was the fourth of the four formulæ in use during the period of the formulary procedure (177 A.D. till 286 A.D.). It occurred in three actions only, viz., *Finium regundorum*, *Communi dividundo*, and *Familie eriscunde*.

ADJUSTMENT. This is the rateable distribution of a loss which is matter for general average (see GENERAL AVERAGE). In an adjustment, the rule now adopted in England differs according as,—

- (1.) The ship arrives at its port of destination, in which case the selling price of the goods is taken; or
- (2.) The ship puts back to the port of

ADJUSTMENT—continued.

lading, in which case the invoice price of the goods is taken.

But in either case the goods sacrificed as well as the goods saved are liable to contribute towards making good the loss, it being obvious that the owners of the goods sacrificed are not to be on a better footing than the owners of the goods saved. *Sm. M. Law*, 295.

The remedy for enforcing contribution towards a general average is by action at law or suit in equity, but not (as a rule) in the Court of Admiralty.

When the amount of the indemnity for damage sustained in the course of a voyage is ascertained, and the proportions thereof which each underwriter of the policy is liable to pay is settled, it is usual for the underwriter to indorse on the policy, "adjusted this loss at so much per cent.," or some words to the same effect, and this is called an adjustment (*1 Park on Ins.* 192). The adjustment when so made is *prima facie* evidence both of the underwriter's liability on the policy, and also of the amount due; and the onus of proof is therefore thrown on the underwriter if he alleges that the adjustment was obtained through fraud, or was made under a mistake of fact, or even (it seems) of law. It is the common practice after an adjustment for the broker of the underwriter to give to the assured his (the broker's) own note, called a credit note, for the amount of the loss payable in a month; but the underwriter still in such a case remains liable, as a surety for the broker, in case the latter should become insolvent during the month.

See title **GENERAL AVERAGE**.

ADMEASUREMENT. A writ which lay against those who usurped more than their share. It used to lie in two cases, first, for admeasurement of dower, and secondly, for admeasurement of pasture. In the former case, it was brought by the heir against the widow of a deceased, who withheld from such heir, or his guardian, more land in respect of her dower than she was justly entitled to, in which case the heir was to be restored to the overplus. In the second case, it lay between those who had common of pasture appendant to their freehold, or common by vicinage, when any one or more surcharged the common with more cattle than he or they ought to have thereon (*F. N. B.* 125, 148; *Les Termes de la Ley*). Nevertheless, the writ for admeasurement of dower did not lie where the excess in the assignment of dower was attributable to the act of the heir himself, who made the assignment *being at the time of full age*; unless, indeed, the excess had arisen from the discovery of mines which had

ADMEASUREMENT—continued.

been overlooked at the time of the assignment. At the present day, this writ of admeasurement is practically extinct as a form of process in both of the two cases in which it was formerly used; and now an action on the case is the common mode of proceeding by one commoner against another for a surcharging of the common, and a suit in Equity is the course to be adopted by the heirs against the widow for the purpose of correcting an excess in the assignment of dower (*Hoby v. Hoboy*, 1 Vern. 218). There is no question, however, but that the writ of admeasurement, never having been expressly abolished, is still available for either of the two purposes before-mentioned, although the wholesale abolition of real and mixed actions which was effected by the Acts 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26, may be thought by some to have extended to the writ of admeasurement also.

ADMINICULUM. An aid or support to something else, whether a right or the evidence of one. It is principally used to designate evidence adduced in aid or support of other evidence, which without it is imperfect.

ADMINISTRATION. The discharging of some duty or office, usually that of getting in and distributing the assets of a deceased person.

See titles **ADMINISTRATION OF ASSETS**; **ADMINISTRATOR**.

ADMINISTRATION, GRANT OF. The administration of the personal estate of a deceased intestate belonged anciently to the sovereign as *parens patriæ*, or to certain lords of manors under a general grant from him, and afterwards to the ordinary who by the Statute of Westminster 2 (13 Edw. 1.) c. 19, was required to pay the debts of the deceased, and who, at a still later period by the stat. 31 Edw. 3, st. 1, c. 11, was required to depute the administration to the next of kin of the intestate. Thus stood administration until the Court of Probate Act (1857), 20 & 21 Vict. c. 77, whereby the power of granting administration was transferred to that Court from the ecclesiastics.

In the grant of letters of administration, there are certain relations of the deceased who are considered to have a preferable right. Thus, the husband has an absolute right to administer to his wife, and the widow has a moral right (which the Court generally recognises) to administer to her husband. When there is no husband or widow, the right to administer belongs to the next of kin according to

ADMINISTRATION, GRANT OF—*continued*.

their proximity in relationship, the right to the beneficial interest under the Statute of Distributions generally regulating the right to the grant of administration; and in the case of there being several next of kin in equal proximity, he whom the majority shall elect in general administrators. A creditor may also administer; and the Court may even appoint to the administration a person entirely without interest, in which latter case the grant is merely *ad colligendum*.

There are various species of administration, namely:—

(1.) A general administration,—when the deceased is wholly intestate;

(2.) Administration *de bonis non*,—as upon the death of a sole executor after probate intestate, or upon the death of a sole administrator;

(3.) Administration *durante minoritate*,—as where the executor appointed by the will being a sole executor is a minor;

(4.) Administration *pendente lite*,—as where any suit touching the validity of the will is pending, and generally wherever the Court of Chancery would appoint a receiver of the estate;

(5.) Administration *durante absentia*,—as where a sole executor is out of the kingdom, and either (a) by the Common Law, before probate, or (b) by stat. 38 Geo. 3, c. 87, after probate; and

(6.) Administration *cum testamento anejo*,—as where either a sole executor dies without having proved the will, or a sole or surviving executor dies intestate.

There are also various other administrations of a limited or temporary kind, e.g. until the will can be proved, or until the executor attains a certain age other than majority, and so forth.

Under the stat. 20 & 21 Vict. c. 77, s. 46, the district registrars of the Court of Probate may grant probate; and under 21 & 22 Vict. c. 95, s. 10, the County Court may make the grant.

The duty on administrations is regulated by the stats. 55 Geo. 3, c. 184, 23 Vict. c. 15, and 27 & 28 Vict. c. 56; and the stamp which is payable upon the bond commonly given by an administrator is now regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97).

ADMINISTRATION OF ASSETS. The Court of Chancery after the grant of probate or administration undertakes to apply the assets of the deceased person in payment of all his debts and legacies in their due and proper order. At the present day property of every kind or sort is available to pay the debts, but there is a certain order observed by the Court in its applica-

ADMINISTRATION OF ASSETS—*contd.*

tion of the different properties for that purpose, the following being the usual order:—

- (1.) The general personal estate not bequeathed at all, or by way of residue only;
- (2.) Real estate devised for the payment of debts;
- (3.) Real estate descended;
- (4.) Specific (including *residuary*) devises, and specific and general legacies all being charged with the payment of debts;
- (5.) General pecuniary legacies and residuary devises, neither being charged (*Hensman v. Fryer*, L. R. 2 Ch. App. 420, extending *Tombs v. Roch*, 2 Coll. 502);
- (6.) Specific (not including *residuary*) devises and specific legacies, neither being charged; and
- (7.) Real or personal estate appointed by deceased person under a general power.

In the application of these properties in or towards payment of debts in a due course of administration, the following is the order of priority in which different classes of creditors rank:—

- (1.) Debts due to the Crown by record or specialty;
- (2.) Legacy and succession duties, and other debts to which particular statutes assign priority;
- (3.) Judgment debts duly registered;
- (4.) Recognizances and statutes;
- (5.) Specialty contract debts; simple contract debts; unregistered judgments; arrears of rent-service;

All placed upon a level by virtue of in consequence of the statute 32 & 33 Vict. c. 46;

(6.) Voluntary bonds in hands of volunteers;

Previously to the stat. 32 & 33 Vict. c. 46, specialty contract debts and arrears of rent-service were entitled to priority over simple contract debts and unregistered judgments in the distribution of what were termed *legal* assets, but were never so entitled in the distribution of equitable assets; and the effect of the stat. 32 & 33 Vict. c. 46, appears to be to abolish altogether the distinction between legal and equitable assets in administrations.

See titles **LEGAL ASSETS; EQUITABLE ASSETS; and MARSHALLING OF ASSETS.**

ADMIRALTY, COURT OF. For the origin of this Court, see title **COURTS OF JUSTICE**. The general jurisdiction of the supreme Court is regulated at the present day by the stats. 24 & 25 Vict. c. 10,

ADMIRALTY, COURT OF—continued.

and 26 Vict. c. 24; and jurisdiction in Admiralty causes was conferred upon the County Court by the stat. 31 & 32 Vict. c. 71. The Court of Admiralty was thrown open to practitioners by the stat. 22 & 23 Vict. c. 6; but the modes of practice, together with the effects of a judgment in that Court, are of a peculiar nature, partaking largely of the rules of the civil law; thus an objection to the jurisdiction of the Court may be taken at any stage of the proceedings (*The Mary Ann*, 34 L. J. (Adm.) 73), and the party is not prejudiced in taking that objection by appearing, (*The Eleanor*, 32 L. J. (Adm.) 19). The judgments of the Court are chiefly *in rem*, and bind all the world as well as the parties to the action.

See titles COLLISION; SEAMEN; SALVAGE; PRIZE; SHIPPING.

ADMISSIBILITY OF EVIDENCE. This phrase denotes the quality of matters adduced in evidence, according to which they are or not receivable, i.e., admissible as evidence,—a question for the judge or Court to determine. It is commonly opposed to the *weight* of the evidence once it has been admitted, the weight being for the jury or for the judge sitting as a jury.

See title EVIDENCE.

ADMISSION. This word denotes the ordinary signification of his approval of the clerk presentee of a living; it sometimes includes both approval and institution. Co. Litt. 344 a.

See also title ATTORNEY.

ADMISSION OF DOCUMENTS. Under the C. L. P. Act, 1852, s. 117, either party may call on the other by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document are visited on the party refusing (without just reason), no matter what shall be the result of the action.

See also title NOTICE TO ADMIT.

ADMISSIONS. In the law of evidence these are either by word of mouth (*Neale v. Jakle*, 2 C. & K. 709), or by conduct (*Pickard v. Sears*, 6 A. & E. 469), or by the assumption of a particular office or character (*Peacock v. Harris*, 10 East, 104), or by writing under hand, unless stated to be "without prejudice" (*Paddock v. Forester*, 3 Scott, 734), or by deed; as to all which see title ESTOPPEL.

But the word "admissions" is more commonly used to denote the mutual concessions which the parties to an action or suit make in the course of their pleadings, and the effect of which is to narrow the area

ADMISSIONS—continued.

of facts or allegations requiring to be proved by evidence. These admissions are generally introduced in the answers to bills of complaint by the phrase "we admit," or "we and each of us admit," and then follows a statement in the words of the bill of the matters so intended to be admitted.

See title EVIDENCE.

ADMITTANCE: See title COPYHOLD.

ADOPTION. In French law, is permitted to persons of either sex, aged fifty years, and being at the least fifteen years older than the persons, whom they adopt; which latter persons being of full age, must be either, (1), persons to whom the adoptive parent has rendered assistance during minority and for six years at least without interruption; or, (2), persons to whom the adoptive parent is indebted for his rescue from fire, shipwreck, or battle. This adoption leaves intact the rights of the child in respect of his natural parents, being in fact the adoption of Roman law, in time of Justinian.

AD QUOD DAMNUM. A writ so called, which ought to have been issued before the King granted certain liberties, as a fair, market &c., which might happen to be prejudicial to others. The writ directs the sheriff to inquire what damage it might do for the King to grant such fair or market. It was also formerly in use for obtaining a right to alter or divert the course of an old road, or to make a new one (F. N. B. 221, *et seq.*; *Les Termes de la Ley*); but it is the opinion of the editor of Williams' Saunders' Rep. vol. ii. ed. of 1871, p. 484, n. (d), that this latter use of the writ has been virtually done away with.

AD TERMINUM QUI PRÆTERIIT. A writ of entry that lay for the lessor and his heirs when a lease had been made of lands or tenements for the term of life or years, and after the term was expired the lands were withheld from the lessor by the tenant or other person possessing the same. Cunningham, F. N. B. 201. This writ was abolished by the Act 3 & 4 Will. 4, c. 27, s. 36.

ADULTERATION. This phrase is commonly applied to the offence of mixing up with food or drink intended to be sold, other matters of an inferior quality, and generally of a more or less deleterious character. The principal statute upon the subject is the 35 & 36 Vict. c. 74, which incorporates the 23 & 24 Vict. c. 84, and also (The Pharmacy Act, 1868) 31 & 32 Vict. c. 121.

ADULTERY OR ADVOWTREY (*Adulterium*). The sin of incontinence by married persons. The crime of adultery is sometimes distinguished into single and double adultery. Single adultery is the crime of illicit intercourse between two persons one only of whom is married. Double adultery is the crime of illicit intercourse between two persons both of whom are married (Cowel). This offence is of a tortious and not of a criminal nature (*Mordaunt v. Moncreiff*, 1874). For adultery on the part of a wife, or for adultery combined with desertion or cruelty on the part of a husband the Court of Divorce will grant a dissolution of the marriage under the stat. 20 & 21 Vict. c. 87.

ADVANCEMENT. This is a well-known term, both in conveyancing and in equity law. In marriage settlements, a power of advancement is commonly given to the trustees, that is to say, a power in them to raise some portion (not as a rule to exceed one half part) of the capital moneys to which each child of the marriage is either actually or contingently entitled under the settlement for his or her advancement in the world; that is to say, for his or her apprenticeship in a profession or trade, or for his or her bringing out in society, or (if intended for the church) for his education at one of the universities of Oxford or Cambridge.

In Equity, the term has a similar meaning, but a somewhat different application. Thus, it being a rule of Courts of Equity, that where a person purchases an estate or stock, and takes the conveyance or assignment thereof in the name of a third person, such third person is intended to be, and is construed as being, a trustee only for the purchaser.—An exception to that rule is admitted in the case of such third person being a person for whom the purchaser was under an obligation to provide, and for whom he has not as yet made a provision, and the conveyance or assignment which is made in this latter case is taken to be for the benefit of the grantee or assignee in discharge of the obligation of the purchaser. The presumption of advancement is raised in favour of the following persons:—

- (1.) A legitimate child (*Sidmouth v. Sidmouth*, 2 Beav. 447);
- (2.) An illegitimate child (*Beckford v. Beckford*, Loff. 290);
- (3.) A grandchild (father being dead) (*Ebrand v. Danoer*, Ch. Ca. 26);
- (4.) A wife (*Drew v. Martin*, 2 H. & M. 130);
- (5.) A wife's nephew (*Currant v. Jago*, 1 Coll. Ch. Ca. 261);

But the presumption has not hitherto been extended to the following cases:—

ADVANCEMENT—continued.

- (1.) An illegitimate grandchild (*Tucker v. Burrow*, 2 H. & M. 515);
- (2.) A kept woman. *Rider v. Kidder*, 10 Ves. 360.

In all these cases the presumption of advancement arises or not from a regard purely to the relationship of the parties; the presumption may be rebutted or corroborated by extrinsic or parol evidence.

AD VENTREM INSPICIENDUM. A writ which lies for the heir presumptive to an estate, to examine the woman who says she is with child, and who is suspected to feign being so, with the view of producing a supposititious heir to the estate. Cowel; Reg. Orig. 237.

ADVERSE CLAIM. Where the sheriff in levying an execution upon the goods of a debtor, finds that some third person claims the goods as his own, he may have an interpleader summons requiring the execution creditor and such third person to settle the right to the goods between them; so also, where the seller of goods attempts to stop them *in transitu*, and the buyer insists upon having the goods delivered to him, the wharfinger or other person in custody of the goods may have an interpleader summons requiring the two parties to litigate between themselves their adverse claims.

See title INTERPLEADER.

ADVERSE POSSESSION. The possession of the tenant for life under a settlement is consistent with the right of the remainderman; and such tenant may not alter the quality of his possession so as to make the same adverse to the remainderman (*Nemo potest mutare causam possessionis sue*). On the other hand, the possession of a mortgagee is adverse to the title of the mortgagor; and precisely because it is such, it will mature after twenty years' duration and non-acknowledgment into an absolute and independent legal right.

See title LIMITATIONS, STATUTE OF.

ADVERSE WITNESS. This is defined to be a witness whose mind discloses a bias hostile to the party examining him; it is not a witness whose evidence being honestly given, is adverse to the case of the examinant.

See titles EVIDENCE; WITNESSES.

ADVERTISEMENTS. Under the stat. 24 & 25 Vict. c. 96, s. 102, whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been lost or stolen, suggesting that no questions will be asked, or offering to repay to any pawnbroker or other the amount advanced on the security of the

ADVERTISEMENTS—continued.

property, forfeits the sum of £50 for every such offence, to be recovered by any informant thereof. And the printer and publisher are also liable, but in their case the action is to be commenced within six months, and only after obtaining the sanction of the Attorney-General or Solicitor-General to the institution of the prosecution.

ADVOCATES. In the Roman law, and also in those English Courts which have largely moulded themselves upon that law, the persons who undertake and have the liberty to plead the causes of others are called advocates. Their duties are analogous to those of barristers, and since the recent Acts, which have thrown open to all practitioners the practice in all the various Courts, the term "advocate" is used interchangeably with, although less frequently than, that of barrister. In ecclesiastical law, those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a liberty to present to the living on any avoidance, were also called *advocati ecclesie*, i.e., defenders of the church (Spelman's *Advocatus*). So that the original meaning of *advowson* was that of a fortress or defence of the church. Patrons of churches were also sometimes called *advoweos* or *avoweas*, and the sovereign was *advoweus* paramount.

ADVOWEE: See title **ADVOCATE**.

ADVOWSON (*advocatio*). The right of presentation to a church or benefice: and he who has the right to present is called the patron or *patronus*, sometimes also *advocatus*, and sometimes *defensor*. Advowsons are of two kinds: (1) Appendant, and (2) In gross. An advowson appendant means an advowson which is, and which from the first has been and ever since continued to be, appended or annexed to a manor, so that, if the manor were granted to any one, the advowson would go with it as incident to the estate. An advowson in gross signifies an advowson that belongs to a person, but is not annexed to a manor; so that an advowson appendant may be made an advowson in gross by severing it by deed of grant from the manor to which it was appendant. Advowsons are also either (1) presentative, (2) collative, or (3) donative. An advowson is termed presentative when the patron has the right of presentation to the bishop or ordinary, and also to require of him to institute his clerk, if he finds him qualified. An advowson is termed collative when the bishop and patron happen to be one and the same person, so that the bishop, not being able to present to himself, performs by one act (which is termed collation) all that is

ADVOWSON—continued.

usually done by the separate acts of presentation and institution. An advowson is termed donative when the king or a subject founds a church or chapel, and does by a single donation in writing place the clerk in possession, without presentation, institution, or induction (Cowel; Co. Litt. 17 b. & 119 b.) Again, advowsons are either advowsons of rectories or advowsons of vicarages; the former having been created in very early times, almost contemporaneously with the creation of the manor itself; the latter having grown up more gradually, and as a consequence of the monasteries appropriating to themselves the tithes of the churches, and delegating to a *locum tenens* (vicar) the duties of the rector. The stipend of the vicar, which was at first precarious and inadequate, was settled at an adequate amount, and also secured to him, by the Acts 15 Ric. 2, c. 6, and 4 Hen. 4, c. 12; whence at the present day a vicarage is in general as valuable a living as a rectory is.

An advowson, being the right of presentation in *perpetuum*, as often as a vacancy arises, is considered real estate, while a right of presenting once only, or a single presentation, is considered personal property only.

ESTIMATIO CAPITIS. This phrase denotes the value or price set upon an individual. In Anglo-Saxon times, when money penalties were the universal punishments of offences, King Athelstan, in a parliament held at Exeter, fixed a tariff of mulcts to be paid *pro estimatione capituli*, i.e., according to the rank of the party wounded or slain. A like tariff existed in Roman law, "*nam secundum gradum dignitatis vitæque honestatem crescit aut minuitur estimatio injuriæ*." Just. Inst. iv. 4, 7.

ESTATE PROBANDA. A writ that used formerly to be directed to the sheriff of a county, commanding him to summon twelve men, as well knights as other honest and lawful men, to be before certain commissioners previously appointed to inquire whether or not the king's tenant, holding in chief by chivalry, was of full age to receive his lands into his own hands. The commission by which the above commissioners were appointed was thence called "The commission *pro estate probanda*." Cowel; 4 Co. Dig. 139.

AFFIANCE. To agree to marry, and generally to pledge one's troth or trust.

AFFIDATIO. A swearing of the oath of fidelity or of fealty to one's lord, under whose protection the *quasi-vassal* has voluntarily come.

AFFIDAVIT. A written or printed statement made voluntarily, and verified by oath, for the purpose of being used in a Court of Justice as evidence of facts. In Courts of Law, affidavits are chiefly used upon summary applications only; but in Courts of Equity they are used upon all sorts of applications, whether formal or summary.

An affidavit consists of three essential parts: (1) the title, (2) the statement of facts, and (3) the jurat. The affidavit should be entitled in the Court in which it is to be used, and in the cause or matter, or both (as the case may be), in which it is made. The statement of facts should be plain and unequivocal; the best evidence should, as a rule be adduced, but matters of hearsay, belief, or information are not excluded. The affidavit may be sworn either in Court or at chambers, or at the office of the Record and Writ Clerks, or before one of the commissioners appointed for that purpose; and if made in a foreign country, then they may be sworn before the mayor or other magistrate, attested and certified by a notary public. If the affidavit is in a foreign language, it must be accompanied with a verified translation.

See title EVIDENCE.

AFFILIATION: *See title BASTARDY.*

AFFINITY. The relationship which marriage occasions between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Thus, there is an affinity between the wife and her husband's brother, but there is no affinity between the wife's sister and the husband's brother, or between the husband's sister and the wife's brother.

AFFIRMATION. This has been substituted for an oath in the case of certain religionists who object, on grounds of conscience, to take an oath—e.g. in the case of Quakers, Separatists, and others; and, in short, any person objecting to be sworn may make a solemn affirmation instead (33 & 34 Vict. c. 49).

See title EVIDENCE.

AFFOREST (*afforestation*). To turn ground into a forest (Cowel). When forest ground is turned from forest to other uses, it is said to become disafforested. Tomlins.

See title FOREST.

AFFRAY (from the Fr. *effrayer*, to affright). The fighting of two or more persons in some public place to the terror of others; and there must be a stroke given or offered, otherwise it is no affray, however quarrelsome or threatening the words may be; and the fighting must also be in public; for if it be in private, it is no affray, but an assault. The punishment for an affray is fine or imprisonment, or both.

AGE. Signifies in the law those periods in the lives of persons of both sexes, which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing. As for example: a male at the age of twelve years may take the oath of allegiance; at fourteen, which is his age of discretion, he may consent to marriage or choose his guardian; and at twenty-one he may alien his lands, goods, and chattels. A female at nine years of age is dowable; at twelve may consent to marriage; at fourteen is at years of discretion, and may choose a guardian; and at twenty-one may alien her lands, &c. But the full age of either male or female is twenty-one, until which time they are considered as infants (Co. Litt. 78; Cowel). The age of twenty-one years is complete on the first moment of the last day next before the twenty-first anniversary of the birth.

See title DAY.

AGENT: *See title PRINCIPAL AND AGENT.*

AGENT AND PATIENT. The same person who is the doer of a thing and the party to whom it is done; as when a woman endows herself of part of her husband's possessions, this being the act of herself to herself, makes her agent and patient. Co. Litt. 8, 138; Cowel.

AGGRAVATION (MATTER OF). In the language of pleadings signifies matter which only tends to increase the amount of damage, but which does not concern the right of action itself. Thus, in an action of trespass for chasing sheep, by which the sheep died, the dying of the sheep is matter of aggravation only, and need not be alleged by the plaintiff in his declaration. Steph. on Pl. 270, 4th ed.

AGIST. To take in and feed the cattle of strangers for reward; whence agistment is the taking in and feeding of such cattle.

AGNATI. Sometimes called *Adgnati*, were those relations of a person, not being of course *sui heredes*, who connected themselves with him by a male relationship all through. They ranked next after the *sui heredes*, and next before the *cognati*. Justinian, after numerous approximations, eventually entirely abolished all distinctions between *agnati* and *cognati*, so that *agnati* and *cognati* indifferently were the next of kin of a person, or, more properly speaking, his nearest relations.

See title NEXT OF KIN.

AGREEMENT: *See title CONTRACT.*

AGRICULTURAL CONTRACTS: *See title LEASES.*

AGRICULTURAL FIXTURES: See title **FIXTURES**.

AIDER. This word is commonly used in two senses, 1st, by itself, when it signifies an abettor: See title **AIDERS AND ABETTORS**. 2ndly, in conjunction with the word verdict. **AIDER BY VERDICT** means curing by verdict. The phrase is used in reference to faults or omissions in pleading. Some faults, errors, or omissions in pleading are aided or cured by the adverse party taking no notice of them, or pleading over, as it is termed, instead of demurring. Others, however, are of so serious a character that even after the party has obtained the verdict of a jury in his favour, the Court, on being applied to, will stay or arrest the judgment, upon the ground that the error is of so important a nature as to vitiate the proceedings. Thus, where a plaintiff brought an action on the case as being entitled to the reversion of a certain yard or wall to which the plaintiff alleged in his declaration a certain injury to have been committed, but omitted to allege that the reversion was prejudiced, or to shew any grievance which, in its nature, would necessarily prejudice the reversion, the Court arrested the judgment after a verdict had been given in favour of the plaintiff; for in this case the gist of the action was the injury to the reversion, and the plaintiff in his declaration had in fact not shewn any such injury to exist. When, however, it may be reasonably presumed, that is, presumed consistently with the general tenor of the pleadings, that the defect was supplied or taken into consideration by the jury previously to giving their verdict, in such cases the error, defect, or omission cannot be made a ground of objection, and is thence said to be cured by the verdict. The principle of aider by verdict is thus stated by Mr. Serjeant Williams: "Where there is any defect, imperfection, or omission in any pleadings, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict." See *Stennel v. Hogg*, 1 Wms. Saund. (ed. 1871), p. 260; *Rushon v. Aspinall*, Doug. 679; 1 Sm. L. C. 614.

AIDERS AND ABETTORS. These are persons who either actually or constructively are present at the commission of an offence, aiding and abetting or counselling and procuring the same to be done; they

AIDERS AND ABETTORS—continued.

are principals in the second degree. The aider and abettor of high treason is a principal in the first degree, *propter odium delicti* (3 Inst. 138); the aider and abettor of a misdemeanour is also a principal in the first degree, but for a very different reason, namely, the maxim *de minimis non curat lex*. Consequently, aiders and abettors that are principals in the second degree are only found in the case of felonies, whether at common law or under any statute. The aider and abettor must participate in the felony, in the sense of acting in concert with those committing it; for although he be present, yet if he do not participate, but remains merely passive, he is not an abettor (1 Hale, 439). Moreover, the participation must be with a felonious intent, and not in ignorance of the nature of the act. 1 Hale, 446.

See also title **ACCESSARY**.

AIDS. Grants of money to the sovereign in support, i.e., aid, of his person and government. They were of two kinds, either (1) feudal, of which there were three sub-varieties, or (2) parliamentary, being tenths, fifteenths, &c.

See title **TAXATION**.

AIR: See title **EASEMENTS**.

ALDERMAN. This word was of very frequent occurrence among the Anglo-Saxons. According to Spelman, all princes and rulers of provinces, all earls and barons, were designated aldermen in a general sense; but the word was applied more particularly to certain chief officers, e.g., "the alderman of all England," whoever that officer was. In modern times, and for many ages past, the word is used to denote certain officers in municipal corporations who are a kind of assessors to the chief magistrate.

See title **MUNICIPAL CORPORATIONS**.

ALE AND BEER HOUSES. Every inn is not an ale-house, nor is every ale-house an inn; but if an inn uses common selling of ale, it is then also an alehouse; and if an ale-house lodges and entertains travellers, it is then also an inn. Numerous statutes have been passed from time to time for the licensing and regulation of ale-houses, the latest of which are the Licensing Act, 1872 (35 & 36 Vict. c. 94), and the Act of 1874, amending same.

ALIA ENORMIA (other wrongs.) Declarations in the action of trespass, after stating or alleging the specific wrongs or injuries complained of, usually conclude with the general words, "and other wrongs to the plaintiff then did, &c.," and this conclusion is frequently called in the lan-

ALIA ENORMIA—continued.

gauge of pleading, the allegation of *alia enormia*. 1 Ch. on Pl. 397; *Souden v. Goodrich*; Peake, 46, per Kenyon.

ALIAS WRIT. This was a second writ issued after a former one had proved ineffectual. If the *alias* also failed, a third writ might have been sued out, which was called a *pluries*. These writs derived their respective names from the words occurring in their respective forms, viz., "*Sicut alias præcipimus*," "*Sicut pluries præcipimus*." Both forms of writ were abolished by the C. L. P. Act, 1852, s. 10, and the same statute in its 9th section has enacted that the plaintiff in any action may, at any time during six months from the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal containing the word "concurrent," and the date of issuing the concurrent writ. The concurrent writ or writs are to be in force only during the period during which the original writ is in force; but by renewing the latter from six months to six months, under s. 11, the concurrent writ or writs may, it seems, be also kept alive. Day's Pr. 36.

ALIBI (*elsewhere*). This word signifies that mode of defence in a criminal prosecution which the accused party resorts to in order to prove that he could not have committed the crime with which he is charged, because he was in a different place at the time of the alleged commission. As a true alibi is conclusive proof of innocence, guilty parties frequently set up false ones in answer to criminal charges; consequently the defence must be strictly proved. A false alibi is easily proved if the witnesses are cross-examined out of the hearing of each other.

ALIEN: See titles NATURALIZATION; ALLEGIANCE.

ALIEN PRIORIES. These were cells of religious persons in England belonging to foreign monasteries. Most of them were dissolved by Act of Parliament in the reign of Henry IV., and some were converted into domestic priories.

ALIENATION. This is the power of the owner or tenant to dispose of his interest in real or personal property. With reference to personal property, the power appears to have always existed, subject only to certain difficulties in the mode of the alienation; but with reference to real property, the power was only slowly and gradually acquired. For,

I. As to Voluntary Alienation,—

Originally no estate of freehold was

ALIENATION—continued.

alienable by the tenant without the consent of the lord of whom he held; and in fact all estates in land were at first only life estates. (See title LIFE ESTATE.) By the time of Henry II., however, the power of alienation was permitted to the tenant over lands acquired by purchase, to the extent of defeating his heirs of their succession (1 Reeve's Hist. E. L. 223), or of part thereof (l. c. 105). Gifts in frank-marriage and in frankalmoign (see these titles) were the earliest of these partial modes of alienation. *Subinfeudation* was the other mode of alienation, which was most common (see that title); and as the heir of the subinfeudor became entitled to the rent or services in lieu of the land, that equivalent (being most probably a substantial equivalent) may have hastened the development of the ancestor's power over the expectant interests of his heir. For, at any rate, as early as the reign of Henry III. the power of the ancestor to destroy the expectation of his heirs, whether collateral or lineal, was become absolute.

The process of subinfeudation infringed also on the rights of the land, rendering it more precarious and also more difficult to levy the services to which he was entitled as landlord in chief; and accordingly it was attempted by statute (*Magna Charta*, ch. 32) to check the practice of subinfeudation. But the practice was not effectually checked by that enactment; and a new mode of grant also about that time came into use, being to a man and his heirs, or to whomsoever he might assign the land,—words which expressly conferred upon the tenant a power of alienation (*Mad. Form. Angl. Prel. Diss.* p. 5). In consequence of this last-mentioned mode of grant, and the power of alienation which it carried with it, the lord was still more prejudiced in his interests, and in particular in his reversion, or right to resume the lands upon the determination of the issue of his grantee. This change to the disadvantage of the land is commonly assigned to the feebleness and distractions of the reign of Henry III., and it is said to have also been fostered by the crusading spirit of the age.

At length, it was enacted by the statute *Quia Emptores* (Statute of Westminster the Third) c. 1, that every freeman might without his lord's consent sell his entire lands, or any portion thereof, the purchaser to hold the lands of the same chief lord that his vendor previously held. In this manner alienation by deed *inter vivos* became complete.

The power of alienation by will grew up later. Putting to one side certain

ALIENATION—continued.

limited customary powers of devise, lands could not originally be devised by will at all, excepting in an indirect and circuitous manner. The method resorted to was to convey the lands by deed *inter vivos* to some third person to hold the same to such uses as the person conveying should mention in his will. This process was checked for the future by the statute 27 Hen. 8, c. 10 (Statute of Uses); but the process having been long in use, the power of testamentary disposition over lands could not be withheld altogether, and accordingly it was partially restored by the stat. 32 Hen. 8, c. 1, which enabled a tenant to dispose of the entirety of his socage tenures and two-third parts of his knight service tenures; and the Act 12 Car. 2, c. 24, having converted all knight service into socage tenures, the power of alienation by will was, by a side wind, made absolute.

II. As to Involuntary Alienation—

Originally lands were not liable to be taken in payment of debts, but subsequently to the reign of Henry III., when estates of inheritance first became general, the liability has been gradually imposed by statute. For, (A.) During the life of the debtor.—By statute 13 Edw. 1, c. 18, one moiety of his legal fee simple lands became liable upon judgment debts by means of the writ of *elegit*, and by the Statute of Frauds (29 Car. 2, c. 3, s. 10), his equitable fee simple lands became also liable in like manner. Then by statute 1 & 2 Vict. c. 110, the entirety of the fee simple lands, whether legal or equitable, of the debtor were rendered liable upon judgment. (See title JUDGMENT DEBTS.) And (B.). After the decease of the debtor.—By the Statute of Frauds (29 Car. 2, c. 3, s. 10, his equitable fee simple lands were made liable to be administered in Equity, and by 3 & 4 Will. 4, c. 104, all his lands (whether legal or equitable or of whatever tenure) were rendered liable in like manner.

An estate tail, although of inheritance, is not liable for debts after the decease of the debtor; but it is liable during his life in case of his bankruptcy, and also upon a judgment duly executed against him, in either case to the same extent that he (the debtor) himself could, without the assistance of any other person, alienate the same. See Bankruptcy Act, 1869, s. 25, and 1 & 2 Vict. c. 110, s. 13, 18.

ALIMONY (*alimonia*). That allowance which is made to a woman for her support out of her husband's estate when she is under the necessity of living apart from him. This provision is allowed the wife during the pendency of a suit between her

ALIMONY—continued.

and her husband, as well to provide the wife with the means to obtain justice as for her ordinary subsistence. When there has been a sentence of divorce, on the ground of the adultery and cruelty of the husband, the allowance for alimony becomes a permanent allowance, and is continued during the period of their separation. Upon an application for alimony, the Court requires on the part of the husband a statement both of his casual and of his certain income to be set forth. See *Hake-will v. Hake-will*, 30 L. J. (M. & P.) 254; *Margetson v. Margetson*, 36 L. J. (M. & P.) 80.

ALLEGIANCE. Otherwise called *ligance*, is the obligation or tie existing between the sovereign and the subjects of any given state, and may be described as the lawful and faithful obedience and duty which the subjects of every state owe to the head of that state in return for the protection which the state affords to them. The learning on this subject will be found in *Calvin's Case* (*Calvin v. Smith*, 7 Rep. 1), 6 Jac. 1, and in the notes to that case in Broom's Const. Law. It is there said that allegiance is of four kinds, namely:—

- (1.) Natural allegiance—that which arises by nature and birth;
- (2.) Acquired allegiance—that arising through some circumstance or act other than birth, e.g., by denization or naturalization;
- (3.) Local allegiance—that arising from residence simply within the country, for however short a time; and
- (4.) Legal allegiance—that arising from oath taken usually at the tourn or leet; for by the Common Law the oath of allegiance might be tendered to every one upon attaining the age of twelve years.

In *Calvin's Case* the point decided was, that Calvin, although born in Scotland after the union of the Crowns of Scotland and England in the person of James I. in 1603, was nevertheless a subject of the king of England, and as such capable of holding or of acquiring by descent lands in England, this decision involving the further more general principle that allegiance to a sovereign is personal and not territorial, and that the maxim, *quando duo jura (imo duo regna) concurrent in und personam, æquum est ac si essent in diversis* was inapplicable. That maxim does, however, apply in determining to what laws a person is to be subject.

Until 1870 it was a rule of the English law that no one could lay aside an allegiance which he had once acquired (*nemo potest exuere patriam suam*) whence arose the difficulty of a "double allegiance" as

ALLEGIANCE—continued.

it was called, with conflicting duties; but by the Naturalization Act, 1870, this rule has been abandoned.

Under the stat. 11 Hen. 7, c. 1, allegiance to the king *de facto*, i.e., for the time being in actual possession of the Crown, whether or not he be *de jure* also, is an effectual protection to the subject against all forfeitures on the ground of disloyalty or treason.

According to the law of England, and also that of America, locality of birth determines the primary allegiance,—a principle which is still adhered to in the Naturalization Act, 1870; but according to the laws of most continental countries, the parentage of the parties determines their primary allegiance. However, by a series of statutes special provision has been made for the following classes of persons born abroad, all of whom are to be esteemed natural-born subjects, namely—

- (1.) Children inheritors of British parents, not merely for the purposes of inheritance (25 Edw. 3, st. 2), but for all other purposes also (*Doe d. Durore v. Jones*, 4 T. R. 308; 7 Anne, c. 5; and 10 Anne, c. 5);
- (2.) Children of British fathers (4 Geo. 2, c. 21);
- (3.) Grandchildren, being the children of such latter children (13 Geo. 3, c. 21); and
- (4.) Children of British mothers (7 & 8 Vict. c. 66), but apparently only as to the estates in England (real or personal) of such mothers.

Aliens becoming permanently subjects of another country may become so either by denization in virtue of the king's letters patent, or by naturalization in virtue of a particular Act of the Legislature, or in virtue of proceedings taken in pursuance of the general Act or Acts.

See titles NATURALIZATION; DENIZEN.

ALLOCATUR (*it is allowed*). After an attorney's bill has been examined or taxed by one of the masters, and the items which he disallows have been deducted, the remaining sum, certified by the master to be the proper amount to be allowed, is termed the *allocatur*. The *allocatur* is conclusive as to the amount of costs. 6 & 7 Vict. c. 73, s. 43; 23 & 24 Vict. c. 127.

ALLODIAL LAND. Land not held of any lord or superior, in which, therefore, the tenant has an absolute property and not an estate merely. The lands of the Anglo-Saxons were allod, but under the oath taken at Salisbury in 1087, all the lands in England became feudal, i.e., held

ALLODIAL LAND—continued.

of some superior lord, and for an estate only.

See title FEUDAL TENURES.

ALLOTMENT: See title COMMON, INCLOSURE OF.

ALLOTMENT, LETTERS OF: See title COMPANY LAW.

ALLUVIO. This is defined to be a latent increase (*latens incrementum*), whereby something goes on adding itself, but it is impossible to say how much at any one moment is added. It is one of the natural modes of acquisition whereby property accrue to one who is already the owner of the principal thing to which the accrual belongs.

See title ACCESSIO.

ALMANACK. The almanack annexed to the Book of Common Prayer, subject to the alterations made in the calendar by the 24 Geo. 2, c. 23, is taken judicial notice of by the Courts of Justice (*Brough v. Perkins*, 6 Mod. 81). And the Court will generally, to refresh its memory, refer to any almanack of received credit. *Page v. Faucet*, Cro. Eliz. 227.

ALNAGE DUTIES. These were duties payable on woollen cloths at so much per ell (*Fr. aulne*); and the officer whose business it was to examine into the assize of woollen cloths was called the *alnager*. All such duties were abolished by 11 & 12 Will. 3, c. 20, s. 2.

See also title TAXATION generally.]

ALTARAGE (*altaragium*). This word comprehends not only the offerings made upon the altar, but also all the profit which accrues to the priest by reason of the altar. When the altarage in part or in the whole was allotted to the vicar or chaplain, it meant only the customary and voluntary offerings at the altar for some divine office or service of the priest, and not any share of the standing tithes, whether predial or mixed. In the case of *Franklyn v. The Master and Brethren of St. Cross*, 1721 (Bunb. 78), it was decreed that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise. See also Spelm. Gloss. 28; Cro. Eliz. 578.

ALTERATIONS IN WRITTEN INSTRUMENTS. The effect of such alterations in a deed (*Pigot's Case*, 11 Rep. 26 b), bill of exchange (*Master v. Miller*, 4 T. R. 320), or promissory note (*Warrington v. Early*, 2 E. & B. 763) is this—

- (1.) If the alteration is material,—then whether (a) it is made by a party

ALTERATIONS IN WRITTEN INSTRUMENTS—continued.

or (b) it is made by a stranger, the alteration vitiates the instrument; and

- (2.) If the alteration is immaterial,—then if (a) it is made by a party, the alteration vitiates the instrument. *Aldous v. Cornwall* (Law Rep. 3 Q. B. 573) must be distinguished, as the case of an immaterial alteration by some *unknown person*;

But if (b) it is made by a stranger, the alteration has no effect at all in vitiating the instrument.

ALTERNATIVE OBLIGATIONS. With reference to these obligations, Lord Coke has said that in case an election be given of two several things, always he who is the first agent shall have the election (Co. Litt. 145 a). And it has been laid down as a general rule that the person who has to perform one of two things in the alternative has the right to elect (*Layton v. Pearce*, 1 Doug. 15). The Roman law agrees generally with the English law in these respects. Brown's Savigny, 68-69.

An election once made is binding, and the promise is thenceforth single to perform the alternative chosen: *Quod semel placuit in electionibus, amplius displicere non potest* (Co. Litt. 146 a). Where the one of two alternatives becomes impossible, or is so from the first, the promise is absolute to perform the other (*Da Costa v. Davis*, 1 B. & P. 242), unless, in the case of an impossibility subsequently arising, the construction of the contract or the circumstances under which it was entered into exclude the ordinary rule (Leake, Contracts, 371-375). It seems that no difference is made, whether the alternative which is impossible is so for *natural* or for *legal* reasons. Brown's Sav. 67.

AMALGAMATE. Two companies cannot amalgamate with each other, unless such a transaction is authorized by the constitutions of both companies, or unless all the shareholders in both consent to the amalgamation. And where there is a power to amalgamate, that power must be strictly pursued (2 Lindl. Puer. 627). Speaking generally, corporations cannot amalgamate. Brice on *Ultra Vires*, 431.

AMBASSADOR. This is the commissioner who represents one country in the seat of Government of another; and as such representative, he is exempt, together with his family, secretaries, and servants, from the local jurisdiction, not only in civil, but also in criminal cases. In England, his exemption depends prin-

AMBASSADOR—continued.

cipally on the stat. 7 Anne, c. 12. Where such an ambassador involves himself in commercial relations, much inconvenience arises, the better opinion being that even in that case he is exempt from the local jurisdiction. But an ambassador may waive his privilege in all these respects, and submit himself to the jurisdiction. Such an ambassador is, however, amenable in his own country to the national jurisdiction thereof; and in fact it is because he carries with him into the foreign country the territory of his own country that he is exempted from the local jurisdiction. (See title *EXTRA-TERRITORIALITY*). Whether the exemption operates to deprive a creditor of his *real* (as opposed to a mere *personal*) right, is a disputed question (see case of the United States Ambassador to Prussia, Wheaton, pp. 307-318). An ambassador is a public minister, which in the usual case a consul is not.

AMBIGUITY: See title *EXTRINSIC EVIDENCE*.

AMENDMENT. This is the correction of some error or omission or the curing of some defect, in judicial proceedings. First, in *civil cases*.—Here amendments are either at common law or by statute. In the times of oral pleading, the parties were allowed to correct and adjust their pleadings at any time during the oral alteration, and were not held to the form of statement which they might first have advanced. And so at the present day, until judgment is signed, either party may even at Common Law amend his pleading until judgment is signed, subject to the discretion of the Court or judge, who will not allow amendments which appear unreasonable, or whereby the opposite party may be prejudiced. But no amendments will be allowed in pleas in abatement, because such pleas are disfavoured. And even after judgment has been signed, the Courts have a power, even at Common Law, of amending, it being considered that during the term wherein any judicial act is done, the record remains in the breast of the judges (Co. Litt. 260 a). This power of amendment at Common Law has been largely supplemented by various Acts of Parliament called the Statutes of Amendment, which are commonly classed with the Statutes of Jeoffails, and by which almost all errors in pleading, being errors in *form* only, are amendable, and certain objections to defective pleadings, being defective as to *form* only, are obviated after certain stages have been reached in a cause. The so-called Statutes of Amendments were the 14 Edw. 3, c. 6, st. 1; 9 Hen. 5, c. 4, st. 1; 4 Hen. 6, c. 3; and 8 Hen. 6, cc. 12, 15; the so-called Statutes of

AMENDMENT—*continued.*

Jeofails were the 32 Hen. 8, c. 30, 18 Eliz. c. 14, 24 Jac. 1, c. 13, 16 & 17 Car. 2, c. 8, 4 & 5 Anne, c. 16, and 5 Geo. 1, c. 13. And see generally as to both the case of *Stennel v. Hogg*, 1 Wm. Saund. 260, ed. 1871.

But under recent statutes, being chiefly the C. L. P. Acts, 1852, 1854, and 1860, much larger powers of amendment are conferred, not only in cases of the misjoinder and non-joinder of party plaintiffs or defendants, but also and principally where a variance appears between the pleadings and the evidence. As to such, see the several titles **MIS-JOINDER, NON-JOINDER, AND VARIANCES**.

Secondly, in *criminal cases*.—It was the opinion of Lord Holt and of the other judges in *R. v. Tucker* (1 Salk. 51), that whatever was amendable at Common Law in civil cases was also amendable at Common Law in criminal cases. The statutes, however, mentioned above, allowing amendments and curing defects in civil cases, did not in general extend to criminal cases at all, except perhaps to cases of misdeemeanour. But by the 7 Geo. 4, c. 64, s. 19, if an accused person pleaded a *misnomer*, the indictment was to be amended by inserting the correct orthography. And by the more recent statutes (11 & 12 Vict. c. 46, s. 4), as to the amendment of *variances*, and 14 & 15 Vict. c. 100, as to errors in the names of counties, cities, &c., and in the allegations of the ownership of property, very large powers of amendment are committed to the judge in criminal trials, where he is of opinion that the defendant cannot be prejudiced thereby in his defence on the merits.

AMENDS, TENDER OF. Under the statute 11 & 12 Vict. c. 44, s. 11, relative to proceedings against justices, the justice may, after the required notice of action has been given, tender such sum of money as he may think fit as amends for the injury complained of in such notice, and he may thereupon pay into Court the money tendered, and may afterwards give in evidence the same; in which case, if the jury assess the injury at no larger amount, judgment shall be given for the defendant, who shall be entitled to deduct his costs out of the money so paid in. A like tender of amends may also be made by revenue officers and by special constables, and also in cases of involuntary trespasses, and for wrongful proceedings under Railway Acts. See Arch. Pr. 1372, 1174, and 1273.

AMERCIAMENT. A pecuniary punishment for some fault or misconduct, differing (in theory at least) from a fine in being less out of leniency (*merci*) than the fault

AMERCIAMENT—*continued.*

or misconduct deserved. Magna Charta, c. 24, requires a freeman to be amerced only for a great fault, and in proportion only to its greatness. See *Griesley's Case*, 8 Co. 38 a.

AMEUBLEMENT. In French law, under the *régime en communauté* (see that title), when that is of the conventional kind, if the husband or wife, or either of them, make their or either of their present or future immoveable property come into the community either in whole or in part, this is called an *ameublement*, which may be either determinate or indeterminate.

AMICUS CURIE. When a Court of Justice is in doubt or in error in a matter of law, any of the counsel present may inform the Court upon it, out of a regard for the Court merely.

AMNESTY. An act of pardon or oblivion, such as that of 1660 (Restoration of Charles II.).

AMORTIZE. To alien in mortmain.

AMPLIARE. "*Est boni judicis ampliare jurisdictionem suam*," i.e., to endeavour to find some ground for assuming jurisdiction in a proper case, not to exceed his admitted jurisdiction.

ANATOMY, SCHOOLS OF. These are regulated by the stats. 2 & 3 Will. 4, c. 75, 4 & 5 Vict. c. 26, 24 & 25 Vict. c. 96, and 34 Vict. c. 15. See also *R. v. Feist*, 8 Cox. C. C. 18.

ANCESTOR. The distinction made between an ancestor and a predecessor in law, is, that the former is applied to an individual in his natural capacity, as J. S. and his ancestors, and the latter to a company, body politic, or corporation, as a bishop and his predecessors. Cowel; Co. Litt. 78 b.; Britton, 169. However, this distinction is not attended to in the Succession Duty Act, 1853 (16 & 17 Vict. c. 53).

ANCESTREL. Relating to one's ancestors. Homage ancestrel was where a tenant and his ancestors had time out of mind held by homage of the lord and his ancestors. Also, real actions were either *possessory*, i.e., of a man's own seisin, or *ancestrel*, i.e., of the seisin of his ancestors.

ANCIENT DEMESNE, or DOMAIN (*vetus patrimonium domini*). A tenure whereby all manors belonging to the Crown in the days of Edward the Confessor and William the Conqueror were held; the numbers and names of which manors, as of all others belonging to common persons,

ANCIENT DEMESNE, or DOMAIN—continued.

William the Conqueror caused to be set down in a book called Domesday; and those which appear by that book to have belonged to the Crown, and are there denominated *terre regis*, are called ancient demesne. Lands in ancient demesne are of a mixed nature, i.e., they partake of the properties both of copyhold and of freehold; they differ from ordinary copyholds in certain privileges, and from freehold by one peculiar feature of villenage, viz., that they cannot be conveyed by the usual common law conveyance, but pass by surrender to the lord or his steward in the manner of copyholds, with the exception that in the surrender the words "to hold at the will of the lord" are not used, but simply the words "to hold according to the custom of the manor." There are three kinds of tenants in ancient demesne. First. Those whose lands are held freely by grant of the king. Secondly. Those who do not hold at the will of the lord, but yet hold of a manor which is ancient demesne, and whose estates pass by surrender, or deed, and admittance, and who are styled customary freeholders. Thirdly. Those who hold of a manor which is ancient demesne, by copy of court roll, at the will of the lord, and are styled copyholders of base tenure (Cowel; Scriven on Copyholds, p. 425; 1 Cruise, Dig. 44). Whether lands are ancient demesne or not must be tried by Domesday Book, F. N. B. 16 D., the authority of which is conclusive (4 Inst. 269); but the question whether lands are parcel of a particular manor which is ancient demesne may be tried by a jury. *Hunt v. Burn*, 1 Salk. 57.

Tenants in ancient demesne used to enjoy certain privileges, e.g., that of being implicated in the Courts of their own manors only, and of being exempted from serving on the juries of the county; but those privileges have mostly ceased, and provision is made by the stat. 4 & 5 Vict. c. 35, and the Acts amending same, for the general enfranchisement of ancient demesne lands.

See title COPYHOLDS.

ANCIENT DOCUMENTS. These are received in evidence for certain purposes, and subject to certain restrictions. But ancient grants are not to be received in evidence unless they can be accounted for as coming, e.g., from the hands of some one connected with the estate (*Swinnerton v. Stafford (Marquis)*, 3 Taunt. 91); or from a reasonably probable custodian of them (*Croughton v. Blake*, 12 M. & W. 205). Ancient surveys have in many instances been held inadmissible to prove the extent or rights of a manor (*Evans v. Taylor*, 7 A. & E. 617;

ANCIENT DOCUMENTS—continued.

Daniel v. Wilkin, 7 Exch. 429). But when ancient documents evidence an act of ownership, then they are admissible as evidence of title (*Doe d. William the Fourth v. Roberts*, 13 M. & W. 520.; as they also are, where they are in the nature of an inquisition in a public matter. *Carr v. Mostyn*, 5 Exch. 69.

ANIMALS. There may be property in wild animals when reclaimed, e.g., in a cat; and in the case of unreclaimed animals, the property in them, according to the law of England, is said to be in the owner of the land upon which they are started and captured (*Blades v. Higgs*, 12 C. B. (N.S.) 501), although by the laws of most countries it is in the captor (See title OCCUPATIO). The owner of animals with a mischievous propensity is liable for the damages they occasion, provided he knows their mischievous propensity. (*Jones v. Perry*, 2 Esp. 482; *Stiles v. Cardiff Steam Navigation Co.*, 12 W. R. 1080.) The stat. 28 & 29 Vict. c. 60, provides for dogs doing damage to cattle or sheep. The stats. 5 & 6 Will. 4, c. 59 (since repealed), 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, punish cruelty to animals; and the stat. 2 & 3 Vict. c. 47, prohibits bear-baiting and cock-fighting. And as to bequests of personal property to a dog-charity, see *University of London v. Jarrow*, 23 Beav. 159.

ANNATES. These were first fruits, and were so called because one year's value of profits is taken as their rate.

ANNUITY. This is a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, and charging the person of the grantor, although it may also be made to charge his real estate, in which latter case it is most commonly called a rent-charge. The remedy was either by writ of annuity or by distress, according as the person or the lands of the grantor were sought to be affected. The Apportionment Act (4 & 5 Will. 4, c. 22) first made annuities apportionable. Under the Annuity Act (53 Geo. 3, c. 141), annuities for lives granted by way of the repayment of money lent, required to be inrolled in Chancery; but now, under the stat. 18 & 19 Vict. c. 15, they require to be merely registered in the Court of Common Pleas. Annuities may also be regarded as legacies payable, not in mass at one time, but by instalments every year or aliquot part of a year; therefore the word *legacies* in general comprises the word *annuities*. *Bolton (Duke) v. Williams*, 4 Bro. C. C. 361; *Mullins v. Smith*, 1 Dr. & Sm. 204.

If an annuity is given *simpliciter*, it is

ANNUITY—continued.

an annuity for the life only of the annuitant (*Kerr v. Middlesex Hospital*, 2 De G. M. & G. 583); or, in the case of joint annuitants, for the life of the longest liver of them (*Wilson v. Maddison*, 2 Y. & C. C. C. 372); and the law is the same since 1 Vict. c. 26 (*Nichols v. Hawkes*, 10 Hare, 342). Where, however, an annuity is given to A. in general terms, and the gift is accompanied with a direction to provide for the same out of the proceeds of property, that is a perpetual annuity (*Kerr v. Middlesex Hospital*, *supra*), unless the direction is mere surplusage, e.g., merely directs payment out of the "general effects" of the testator (*Innes v. Mitchell*, 6 Ves. 464); and, of course, the testator may, by express words, give a perpetual annuity. *Stokes v. Heron*, 12 Cl. & F. 161.

Sometimes an annuity is payable only out of income (*Foster v. Smith*, 1 Ph. 629), and sometimes it is a charge on the corpus itself of the estate (*Wright v. Callender*, 2 De G. M. & G. 652), in which latter case the annuitant may, if the income is insufficient, require a sale of a sufficient part of the corpus (*May v. Bennett*, 1 Russ. 370), and will even be entitled to a prospective order for the necessary successive future sales (*Hodge v. Levin*, 1 Beav. 431). An indefinite trust to receive rents for payment of an annuity is a charge of the annuity upon the corpus (*Phillips v. Gutteridge*, 11 W. R. 12); and a direction to purchase an annuity for A. entitles A. to have the purchase-money paid over to him or her (*Ford v. Batley*, 17 Beav. 303; *Re Brown's Will*, 27 Beav. 324); although the testator may have directed the contrary (*Stokes v. Cheek*, 28 Beav. 620); and if the intended annuitant is dead, his personal representatives will be entitled to the purchase-money (*Day v. Day*, 1 Dr. 569), although the purchase-money is to consist of the proceeds of land sold. *Bayley v. Bishop*, 9 Ves. 6.

An annuity will abate with general legacies (*Carr v. Ingleby*, 1 De G. & Sm. 362), unless the annuity is given as a specific interest in land, when it will only abate with the other specific legacies. *Creed v. Creed*, 11 Cl. & F. 491.

When an annuity is given by will, the first payment thereof is to be made, in the absence of express directions otherwise directing payment, one year after the testator's death (*Gibson v. Bott*, 7 Ves. 96), or if successive interests for life and in remainder are given by way of annuity out of a sum of money directed to be placed out to answer it, then two years from the testator's death. *Gibson v. Bott*, *supra*.

ANSWER. This is the most usual mode of raising defences to a bill of complaint

ANSWER—continued.

in the Court of Chancery, being more common than either plea or demurrer. By the Judicature Act, 1873, this form of pleading is extended to the Courts of Common Law.

See title PLEADING.

ANTE-NUPTIAL SETTLEMENT: See title MARRIAGE SETTLEMENTS.

ANTICIPATION. This word is commonly used in Courts of Equity as signifying the alienation of married women. It is a rule of the Common Law that the absolute property given to any one cannot be fettered with any restraints or conditions against alienating (Tud. L. C. Conv. 858; *Bradley v. Peizoto*); but Courts of Equity in the case of property given to the separate use of a married woman allow the restraint, as tending to render the separate use more perfect and assured (*Tullett v. Armstrong*, 1 Beav. 21). Whence the clause against anticipation is common in gifts of property to females to their separate use.

See title SEPARATE ESTATE.

ANTICHRESE: See title NANTISEMENT.

APOLOGY. In the case of a libel being published in a newspaper or other like public writing, the 6 & 7 Vict. c. 91, provides that the defendant may plead the inadvertent insertion of same without malice or gross negligence, and the prompt insertion in the same publication of an apology for same; and he may pay into Court at the same time a reasonable sum of money by way of amends. A like provision is made in the case of defendants being private individuals (s. 1), and such apology shall go in mitigation of damages.

APOSTASY. This offence differs from heresy in this, that apostasy is a total renunciation of a religious belief once possessed, while heresy consists in denying some one particular doctrine only. At the present day apostasy is punishable under the stat. 9 & 10 Will. 3, c. 32 (Rev'd. Stats. 9 Will. 3, c. 35), by incapacity for or deprivation of offices of trust or emolument, and by imprisonment for three years without bail. The information must be laid within four days after the outward profession of apostasy, and be followed up within three months, otherwise the accusation falls through. The penalty is also remitted upon an open retraction in Court of the offence.

APOTHECARY: See title MEDICINE.

APPARITOR. This was a messenger of

APPARITOR—continued.

the spiritual Courts, whose duty was to serve the process thereof.

APPEAL (from the Fr. *appeler*). This word has two significations: it signifies in one sense a complaint or an appeal to a superior Court, when justice is supposed not to have been done by an inferior Court. It also signifies, when spoken in reference to a criminal prosecution, an accusation by one subject against another for a heinous crime, demanding punishment for the injury sustained by himself, rather than for the offence committed against the public. Criminal appeals were however abolished by 59 Geo. 3, c. 46. The principal kinds of them while they existed were the following: 1. Appeal of arson. 2. Appeal of death. 3. Appeal of mayhem. 4. Appeal of rape; and 5. Appeal of robbery (59 Geo. 3, c. 46). Of these appeals all were capital, except that of mayhem. The latest instance of an appeal was *Ashford v. Thornton* (1 B. & A. 405) (one of rape followed by murder), and probably in consequence of that case the above-mentioned statute was passed forbidding such appeals for the future. Where the verdict in an appeal was in favour of the appellant, he might insist upon what terms he pleased as the ransom of the appellee's life. It has been suggested that, although appeals are abolished, some right of action for pecuniary compensation should be permitted in the cases in which appeals formerly lay.

The right of appeal in certain cases has been extended by various recent statutes, thus:—

- (1.) An appeal from a decision of the Court on a rule to enter a verdict, or a nonsuit, or for a new trial, under C. L. P. Act, 1854;
- (2.) An appeal in Crown Cases Reserved, under 11 & 12 Vict. c. 78;
- (3.) An appeal from a decision of justices in summary proceedings, under 20 & 21 Vict. c. 43;
- (4.) An appeal from an order giving relief in ejectment against forfeiture, under C. L. P. Act, 1860; and
- (5.) An appeal from a revising barrister in election matters, under 28 & 29 Vict. c. 36.

See also **COUNTY COURT**, for appeals therefrom; and **QUARTER SESSIONS**, for appeals therefrom and thereto.

APPEARANCE. In an action at law, when a defendant is served with a writ of summons, which is a judicial mandate issuing out of and under the authority of the Court in which the defendant is sued,

APPEARANCE—continued.

he is bound by the command which is contained in that writ to enter an appearance thereto within eight days; this appearance is a memorandum in writing according to a prescribed form, signifying that the defendant has appeared, according to the command of the writ, and such memorandum is delivered to the proper officer of the Court, and by him is entered in a book kept for that purpose; and this is what is technically called entering an appearance (Arch. Prac.; Tidd). The word is also applicable to proceedings in other Courts besides those of the Common Law; and it has a very similar meaning as used in the proceedings in a suit in Equity. The practice was first introduced into Courts of Equity by the Orders of 8th May, 1845.

In the case of infants and married women, they are to appear, the former by his or her guardian, and the latter in person, in an action at Law (2 Arch. Pr. 1252); and the former by his or her guardian *ad litem*, and the latter either in person or by her next friend, in a suit in Equity (1 Dan. Ch. P. 460; Morg. Ch. Acts, 691). The effect of entering an appearance is to waive any irregularity in the process (*Forbes v. Smith*, 24 L. J. (Ex.) 167); but in the Courts of Equity a conditional appearance may be entered which shall not have that effect. 1 Dan. Ch. Pr. Ch. xiii.

For neglect to appear, or in default of appearance, in an action at Law, if the writ of summons is specially indorsed, the plaintiff may, under certain circumstances, sign final judgment at once (C. L. P. Act, 1852, s. 27), and if the writ of summons is not specially indorsed, he may, with leave, proceed to file his declaration with short notice to plead, and in that way arrive at judgment (s. 28). In a suit in Equity, the plaintiff may enter an appearance for a defendant.

APPENDANT. This word, in its general sense, denotes anything annexed in whatever manner to any other. But as applied to incorporeal hereditaments in the law of real property, it denotes something annexed as an incident to some other and corporeal hereditament, and the annexation of which thereto is of a necessary character, and has therefore existed from the very beginning of time. Thus, that amount of common which from the first, and as of necessity, the lord assigned to his villeins to depasture their beasts of husbandry during such times as their lands (which were all of them arable) were in ear, was called common of pasture appendant; and similarly, the lord from the first, and as of necessity, erected and endowed a church

APPENDANT—*continued.*

(being the manor or parish church) for the religious education and welfare of his tenants, and the endowment of such church was called an advowson appendant, *i.e.*, to the manor. It is also a characteristic of properly appendant rights, that once they are disannexed, although for ever so short a time, from the principal hereditament, so as to become *in gross*, they can never become appendant again.

See further, titles **APPURTENANT**, **IN GROSS**; and **INCORPOREAL HEREDITAMENTS**.

APPOINTMENT TO OFFICES. Where a person acts in a public capacity, his so acting is *prima facie* evidence of the validity of his appointment (*R. v. Winnifred*, 1 Leach, C. C. 515); and this presumption is adopted in the Criminal Law Consolidation Acts of 1861.

APPOINTMENT, POWERS OF. These are either general or special; the former enabling the donee of the power to appoint to any one he pleases, and even to himself (for which reason, the property which is subject to a general power of appointment is liable in case of his bankruptcy: Bankruptcy Act, 1869, s. 15, sub-s. 4); the latter enabling him to appoint among particular individuals only, or not at all. There is also the following distinction between these two kinds of powers, *viz.*, that the general power, when exercised, dates from the exercise thereof, and not earlier; while the special power, when exercised, dates from the creation thereof, which is necessarily an earlier period than that of the exercise.

See further, titles **CONVEYANCES**; **POWERS**.

APPORTIONMENT. This word applies to *rents*, *annuities*, and *common*. First, as applied to *rents*, it denotes a division of the rent in certain proportions; and as to *rents-service*, these (although originally and in their own nature indivisible) have been divisible since the stat. *Quia Emptores*, 18 Edw. 1 (Statute of Westminster the Third) c. 1, and as to *rents-seck*, *rents-charge*, &c., these have been made apportionable by the stat. 4 Geo. 2, c. 28; and now also by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, the release of part of land subject to a rent-charge does not release the other part, which the intention was should remain unreleased. By the stat. 11 Geo. 2, c. 19, rents secured on leases are made apportionable between a landlord (tenant for life) deceased and the succeeding remainderman or reversioner—an apportionment which has been made universal by the stats. 4 & 5 Will. 4, c. 22, and the

APPORTIONMENT—*continued.*

Apportionment Act, 1870 (33 & 34 Vict. c. 35). Secondly, as applied to annuities, these were made apportionable by the stat. 4 & 5 Will. 4, c. 22, a provision which has been extended by the stat. 33 & 34 Vict. c. 35, the 2nd section of which enacts as follows: "From and after the passing of this Act [Aug 1, 1870], all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." Thirdly, as applied to *common*, upon a purchase by the commoner of part of the land over which his right of common exists, the right may be apportioned (Co. Litt. 149 a); and it makes no difference, *sensu*, that the right of common is that to common *sans nombre*. *Wild's Case*, 8 Rep. 79; *Bennett v. Reeve*, Willes, 232.

See also titles **RENT**; **ANNUITIES**; **DIVIDENDS**; and **COMMON**.

APPORTIONMENT OF RENT. By the Common Law there was no apportionment of rent in respect of *time*, rent not being regarded as accruing *due de die in diem*. *Clun's Case*, 10 Co. 126 a.

Accordingly (1.) If the lessor was owner in fee simple, or (being owner for a limited estate) had a power of leasing, upon his death in the interval between two days of payment, his executors were not entitled to any part of the rent in respect of the accrued portion of the interval, but the rent for the entire interval went to the person who took the reversion (whether as heir-at-law, devisee, or remainderman). *Earl of Strafford v. Lady Wentworth*, 1 P. Wms. 180.

And (2.) If the lessor was tenant for life, or for any other limited estate, and had no power of leasing, upon his death in the interval between two days of payment, his executors were not entitled to any part of the rent in respect of the accrued portion of the interval, and neither was the reversioner entitled to that part of the rent, but that part ceased to be payable at all by the tenant to any one. *Jenner v. Morgan*, 1 P. Wms. 392.

However, by statute, rents have been made apportionable, the principal statutes being the following:—

(a.) By 11 Geo. 2, c. 19, s. 11, when any tenant for life, not having a power of leasing, dies on or before the day on which the rent is payable by his lessee, the executors of such tenant for life are entitled to the whole or a proportion (as the case may be) of the rent in respect of the accrued interval or accrued portion thereof; and it has been

APPORTIONMENT OF RENT—contd.

held that the statute extends to a tenant in tail (*Whitfield v. Pindar*, 8 Ves. 311). The statute did not, however, extend to land tax or quit rents; neither were such rents apportionable in Equity (*Sutton v. Chaplin*, 10 Ves. 66); and it was doubtful if it extended to tenancies held *pur autre vie*.

Accordingly, (b.) By 4 & 5 Will. 4, c. 22, commonly called the Apportionment Act, it has been enacted that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof) or on the death of the life or lives for which such person was entitled to such hereditaments, *shall*, so far as respects the rents reserved by such leases and the recovery of a portion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the Act 11 Geo. 2, c. 19, s. 11; and that all rent service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (being in each case a lease granted after the 10th of June, 1834), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description in the united kingdom of Great Britain and Ireland made payable or becoming due at fixed periods under any instrument (being an instrument that came into operation after the said 10th of June, 1834) should be apportioned so and in such manner that, on the death of any person interested in the said respective payments, or on the determination otherwise of the interest of such person therein, he or she, and his or her executors, administrators or assigns, should be entitled to a proportion thereof, according to the time which should have elapsed from the commencement or last period of payment thereof respectively (as the case may be) including the day of the death or other determination of the interest of such person, subject nevertheless to all just allowances and deductions in respect of charges thereon respectively, the remedies for the recovery of such proportion to become available when the entire amount is become payable, and not before; such remedies to lie and be directed against the person or persons who (but for this Act) would have been entitled to receive and to retain the entirety of the said respective payments.

(c.) By the Act 14 & 15 Vict. c. 25, s. 1, when the lease or tenancy, being at a rack rent, shall determine by the death or ceasing

APPORTIONMENT OF RENT—contd.

of the interest of the landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the principle of an apportionment of rent is introduced, the tenant being allowed to hold on till the end of the current year of his tenancy, upon the terms of the old holding, whereupon he goes out without any notice to quit either given or received.

(d.) By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) s. 119, and under the Church Building Acts (17 & 18 Vict. c. 32), the principle of apportionment of rent is also adopted, when part only of the land comprised in the lease or underlease (as the case may be) is required for the purposes of the works authorized by those Acts respectively.

Lastly, (e.) By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), the principle of apportionment was extended to the cases of rents, annuities, dividends, and other periodical payments in the nature of income reserved or made payable otherwise than by an instrument in writing, with the like remedies for the recovery of the proportionate payment. This Act was necessitated by the decision in *Cuttle v. Arnold* (1 J. & H. 651), which limited the earlier Acts to payments reserved by instruments in writing only.

APPRAISE. To set or affix the true price or value on goods. By stat. 11 Edw. 1 (Acton Burnell), appraisements are to be made on oath, and are to be at the true value, under the penalty of the excessive appraiser having to purchase at his own valuation; and by stats. 46 Geo. 3, c. 43, and 8 & 9 Vict. c. 76, appraisers must be licensed, and by the Stamp Act, 1870 (33 & 34 Vict. c. 97), every appraisement is to bear a stamp of 6d. for every £10 of value, and for every value between £5 and £10, and a stamp of 3d. for £5 of value or under. But appraisements made for one side only, and not being obligatory as between the parties, are exempted.

APPREHENSION OF OFFENDERS: *See* title CONSTABLE.

APPRENTICE. A person in the course of learning any profession is so called in law; but the name is now commonly limited to a person bound by indenture to a tradesman, who thereby undertakes for certain considerations to teach him his trade. See the duties of the master explained in *Couchman v. Siller* (23 L. T. 480); and those of the apprentice in *Cooper v. Simmonds* (7 H. & N. 707). Where, as usually happens, the apprentice is an infant, no action lies against him on his covenant (*Gylbert v. Fletcher*, Cro. Car. 179),

APPRENTICE—continued

unless by special custom (*Whittingham v. Hill*, Cro. Jac. 494); therefore usually the parent covenants for him, but the infant must execute the indenture (*R. v. Arnesley*, 3 B. & A. 585). Under the Stamp Act, 1870, the indenture must be stamped with a 5s. stamp for every £5, or fraction of £5, of premium, and with a 2s. 6d. stamp where there is no premium.

Regarding parish apprentices, see 3 & 4 Will. 4, c. 63, and 7 & 8 Vict. c. 101; and for the jurisdiction of justices of the peace regarding such, see the same statutes, and also *Reg. v. Pround*, Law Rep. 1 C. C. 71.

APPROPRIATION. This word is commonly used in two senses, viz. (1.) the appropriation of benefices, and (2.) the appropriation of payments.

(1.) An appropriation of a benefice.—This is the annexing of a benefice to the use of some religious house, or spiritual corporation, whether sole or aggregate, to enjoy for ever; just as an impropriation is the annexing a benefice to the use of a lay person or corporation. See also title IMPROPRIATION.

(2.) Appropriation of a payment.—This means the application of a payment to the discharge of a particular debt. Thus, if a creditor has two distinct debts due to him from his debtor, and the latter makes a general payment on account without specifying at the time to which debt he intends the payment to apply, it is optional for the creditor to appropriate (*i.e.*, to apply) the payment to either of the two debts he pleases. The leading case upon the subject is *Clayton's Case* in *Devaynes v. Noble* (1 Mer. 585; Tud. Merc. Ca. 1); from which case and the notes thereto, the following rules may be gathered:—

(1.) The first option to appropriate belongs to the debtor at the time of payment. The appropriation in this case may be either express (*Ex parte Imbert*, 1 De G. & J. 152), or implied (*Shaw v. Pictou*, 4 B. & C. 715), or presumed (*Young v. English*, 7 Beav. 10). In the case of several debts, some of which are barred by the Statute of Limitations and some not, the presumption is, that the payment is made on account of the debt or debts not barred. *Nash v. Hodgson*, 6 De G. M. & G. 474, reversing the decision of Wood, V.C., Kay, 650.

(2.) The second option to appropriate belongs to the creditor (Dig. 46, 3, 1), and this appropriation need not be made at the time of payment, but at any time afterwards until the matter comes to trial (*Simson v. Ingham*, 2 B. & C. 65); appropriation can only be made once, at least after notice of the first appropriation has been given to the debtor. But it is competent for a debtor

APPROPRIATION.—continued

and his creditor to make a new contract varying the appropriation of past payments (*Merriman v. Ward*, 1 J. & H. 371). Where one of two or more debts is barred by the Statute of Limitations, and the other, or others, are not barred, the creditor may appropriate the payment to the debt or debts which are barred, and afterwards pursue his remedy for the recovery of the other or others (*Mills v. Fowkes*, 5 Bing. (N.C.) 455); and similarly in the analogous cases mentioned in *Cruikshanks v. Rose*, 1 Moo. & Rob. 100 (sale of spirits on credit), and *Arnold v. Poole* (Mayor), 4 M. & G. 860 (solicitor to corporation). *Secus*, if the debt is absolutely unlawful, *e.g.* a gambling debt. And, apparently, the two debts must be of ascertained amount. *Goddard v. Hodges*, 1 C. & M. 33 (unsettled partnership accounts); *Goddard v. Cox*, 2 Str. 1194 (assets in administration).

(3.) Failing any appropriation by the creditor, the law appropriates the payment to the various debts in the order of their respective dates, beginning with the earliest (*Clayton's Case*, *supra*). Of course, however, one man's money will not be appropriated by the law towards payment of another man's debt, *e.g.* partnership moneys in payment of a single partner's debt (*Thompson v. Brown*, 1 Mood. & Malk. 40). The appropriation by the law is first to interest, and only secondly to principal (*Chase v. Box*, Hov. Freem. 261; *Bower v. Morris*, 1 Cr. & Ph. 351; Code 8, 53, 1; Dig. 46, 3, 5, § 8). But the law will not in the last-mentioned case appropriate any part of the money paid to interest barred by the statute (*In re Fitzmaurices Minors*, 15 Ir. Ch. Rep. 445); nor will the law appropriate a payment to money illegally due. *Wright v. Laing*, 3 B. & C. 165.

Appropriation of payments must be distinguished from apportionment of same between debts having equal rights to be paid. *Favenc v. Bennett*, 11 East, 36; Dig. 46, 3, 8.

APPROPRIATION OF SECURITIES.

Where a security has been deposited with a creditor generally, and the debtor afterwards becomes bankrupt, owing two or more debts, one or some of which are proveable, and the other or others not proveable, the creditor may appropriate the security to the debt or debts which are not proveable. *Ex parte Hunter*, 6 Ves. 94.

APPROVEMENT. This word has several meanings. It signifies much the same as improvement; thus, approvement of common means the inclosing a part of a common by the lord of the manor for the purpose of cultivating the same, leaving

APPROVEMENT—continued.

sufficient nevertheless for the commoners. Secondly, it is also said to signify the profits of a farm (Cowel). Thirdly, it signifies the act of an approver, who, when indicted of treason or felony, and arraigned for the same, confesses the fact before plea pleaded, and accuses others, his accomplices, of the same crime in order to obtain his own pardon. 3 Cruise, 89; Cowel; 2 T. R. 391.

APPURTENANT. This word denotes annexed or belonging to; but in law it denotes an annexation which is of convenience merely and not of necessity, and which may have had its origin at any time, in both which respects it is distinguished from Appendant (see that title). In conveyances of lands and houses, it is usual to add to the parcels, or else to the *habendum*, or to both, the phrase "with the appurtenances," and to make surer, to add "or reputed as appurtenant or belonging thereto." The term is commonly confined in law to the purely incorporeal hereditaments that are commonly annexed to lands or to houses, and may include as well common, as any other right. *Lister v. Pickford*, 34 Beav. 576.

See title INCORPOREAL HEREDITAMENTS.

ARBITRATION AND AWARD. All matters in dispute concerning any personal chattel or personal wrong may be referred to the decision of an arbitrator; and although much jealousy was formerly, and some jealousy is still, felt in allowing references of questions regarding real property, yet references have been made and allowed of the following matters—partition between joint tenants and tenants in common, settlement of disputed boundaries, waste between landlord and tenant, title of devisees, and generally upon title. Parties may even agree to refer to arbitration any future differences between them, although none at present may exist. And under various Acts of Parliament civil matters are compulsorily referred, in particular matters of account, under the C. L. P. Act, 1854 (17 & 18 Vict. c. 125, ss. 3-6), when they cannot be conveniently tried in the ordinary way. But with regard to criminal matters, the old rule was, that matters criminal were not arbitrable; and it may be said still that offences of a public nature are not referable. On the other hand, it has been said that in all cases where the injured party has a remedy by action as well as by indictment, he may refer same, procuring the consent of the judge if the indictment has been already commenced, or a conviction upon it obtained.

The persons who may refer matters to arbitration are of a correspondingly various

ARBITRATION AND AWARD—contd.

character. Firstly, where the referring parties are interested on their own account in the matters referred, it is a general rule that every one capable of making a disposition or release of his or her right may also make a submission to an award (Com. Dig. Arb. D. 2); and conversely, the incapacity to contract involves the incapacity to refer. But as between partners, one partner cannot bind the other by his sole submission; and it matters not whether the partnership be general or particular, the submission to an award not being within the scope of the partnership or incident to any matters within such scope; and all the partners must execute the submission in order that any of them may be bound by the award (*Antram v. Chase*, 15 East, 209). Secondly, where the referring parties have no personal interest in the award, but act in the capacity of trustees or agents only, it is a general rule that the agent referring must have authority so to do, but such authority, where not express, may be implied from the nature of the agency. Thus, the better opinion is, that a solicitor or attorney retained generally has an implied authority to refer (*Douce v. Coze*, 3 Bing. 20), unless, *semble*, he is expressly forbidden to make a reference. *Filmer v. Delber*, 3 Taunt. 486.

See further titles SUBMISSION, REVOCATION, UMPIRE; and for the proceedings incident to a reference, and the form and execution of the award, with the remedies thereon, see generally Russell on Arbitrations.

ARCHBISHOP. The head or chief of the clergy in a whole province. He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has his own diocese wherein he exercises *episcopal*, as in his province he exercises *archiepiscopal*, jurisdiction. To him, or to his Court, all appeals are made from inferior jurisdictions within his province; and as an appeal lies or lay from the bishops in person to him in person, so it also lies from the Consistory Courts of each diocese to his Archiepiscopal Court. 1 Burn's Ec. Law; 2 Roll. Abr.

See also titles ARCHES, COURT OF; CONSISTORIAL COURTS; and ECCLESIASTICAL COURTS.

ARCHDEACON. A dignity of the church who has ecclesiastical jurisdiction immediately subordinate to that of the bishop, either throughout the whole of his diocese or in some particular part of it. He is nominally appointed by the bishop himself, and has a kind of episcopal authority originally derived from the bishop,

ARCHDEACON—*continued.*

but now, independent and distinct. It was formerly his office to grant letters of administration, but that duty is now discharged by the district Probate Courts. He visits the clergy, and has his separate Court for the punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance. Com. Dig. Ecclesiastical Persons; Burn's Ec. Law; 1 Lev. 192.

See titles **ARCHBISHOPS**; **ECCLESIASTICAL COURTS**.

ARCHES, COURT OF. An ecclesiastical Court, so called because originally held in the Church of St. Mary-le-Bow (*de Arcubus*). It was latterly held in the hall belonging to the College of Civilians, commonly called Doctors' Commons; but in more recent times, the office of the Court of Arches has become annexed to, and is commonly discharged by, the judge of the Court of Admiralty, in his Court at Westminster.

The Court of Arches is the Court of Appeal of the Archbishop of Canterbury; the judge thereof hears all appeals from bishops or their chancellors, or commissaries, deans and chapters, and archdeacons; and from his decision an appeal lies at present to the Judicial Committee of the Privy Council, but under the Judicature Act, 1873, the appeal is to be to the Court of Appeal, constituted by that Act (ss. 18, 21). The Court of Arches has an original jurisdiction over the thirteen peculiar parishes in London which belong to the Archbishop of Canterbury; but upon receiving letters of request from any bishop, he may assume original jurisdiction in any ecclesiastical matter arising elsewhere.

ARCHIVES. This word, which is derived from *arca*, a chest, was originally used to denote a repository for documents, but by a natural transference, has come to denote the documents themselves.

ARISTOCRACY: *See* title **CONSTITUTION**.

ARMIGER: *See* title **ESQUIRE**.

ARMORIAL BEARINGS. For the duty on these, see Stamp Act, 1870 (33 & 34 Vict. c. 14), Sch.; *see* also title **HERALD'S COLLEGE**.

ARMOUR, or ARMS. In the meaning of the law are anything that a man wears for his defence, or takes into his hands for that purpose, or uses in his wrath to cast at another, or to strike him with. So that the appellations, "armour" and "arms," do not in the law simply signify a sword, shield, helmet, or such like; but extend also to stones and other missiles used for the pur-

ARMOUR, or ARMS—*continued.*

poses of defence or warfare. Crompt. Just. 65; Cowel; Holthouse.

ARMS: *See* title **ARMOUR**.

ARMY. In ancient times, the English forces were composed of the following varieties of men-at-arms, viz. :—

- (1.) Persons holding by knight service, and who were required, by virtue of their tenure to serve forty days annually;
- (2.) Other persons engaged by contract;
- (3.) Freemen or freeholders generally, in virtue of the mere general duty of allegiance.

The first and second of these varieties constituted the *Army Proper*; the third variety was the *Militia*.

I. Army Proper:—The statute 1 Edw. 3, c. 5, enacted that no one should be called upon for service otherwise than as before used and accustomed, and that no one should be sent out of his own county unless in cases of invasion, or other like sudden emergency; but inasmuch as that monarch, notwithstanding the statute, called upon the counties and principal towns to furnish him with forces, therefore the statute 25 Edw. 3, c. 8, further enacted that no unusual services should be required, unless with authority of parliament.

Upon the accession of the Tudor dynasty, these statutes of Edward III. were entirely disregarded, in particular by Henry VIII. and Elizabeth, who not only compelled the counties to furnish soldiers, but also pressed men into the service as well abroad as at home; and the statutes 4 & 5 Ph. & M. c. 3, expressly recognises the right of the sovereign to levy forces.

The nucleus of a standing army appears to have been the 200 yeomen of the guard, maintained by Henry VIII., together with some artillerymen, stationed in the Tower of London, in the Castle of Dover, at the Fort of Tilbury, at Portsmouth, and at Berwick-on-Tweed. Subsequently, upon the split between the sovereign and parliament, in the reign of Charles I., the sovereign maintained his forces, and the parliament theirs; and upon the Restoration of 1660, Charles II. retained 5000 guards as a standing army, and shewed a disposition on several occasions, particularly in 1667, 1673, and 1678, to increase their number to 20,000. James II. maintained a standing army contrary to the wishes of Parliament; and upon the Revolution in 1688, William III. maintained 7,000 men as a standing army, a number which, under Walpole's administration (George II. and III.), was increased to 17,000, exclusive of the forces maintained in Ireland.

ARMY—continued.

Court martials were established for the first time, in 1718, by a clause in the Mutiny Bill of that year, and have since been continued under the annual Mutiny Act.

The statute 8 Geo. 2, c. 30, prohibits troops from appearing at elections; and in 1741 a resolution was made in the Commons declaring that it was a high infringement of the liberty of the subject for the troops to have appeared (as they had done) at the Westminster election of that year.

II. Militia:—The freeholders of each county were originally summoned by the earl for self-defence, and were under a general duty to be properly furnished with arms for that purpose. By the Statute of Winchester (13 Edw. 1.), in aid of the Common Law, all male persons between the ages of fifteen and sixty were required to keep arms in accordance with their station, and might at any time be called out as a *posse comitatus* by the sheriff, who had by that time taken the place of the earl, at least in matters of mere internal police. But these freeholders, keeping themselves in constant readiness, were capable of being mobilized as a militia for the purposes of the national defence.

The stat. of 1 Jac. 1, c. 25, established magazines of arms in each county, and Mary having previously created the body of lords-lieutenant, the militia was henceforth under the control of these latter officers, and a certain number of freeholders acted as a militia in relief of the general body. The Train Bands of London were a noted regiment of militia, formed in the reign of Henry VIII., and so called in the reign of Elizabeth (1588).

In 1642, the Long Parliament introduced a bill for regulating the militia, and assumed the right of nominating the lords-lieutenant who were to have the command; but in 1660, the sole right over the militia was declared to reside in the Crown, and not in Parliament. In 1757, the militia were re-organised, and placed nearly on their present footing.

ARRAIGN, ARRAIGNMENT (*ad rationem ponere*). To arraign a prisoner is to call him to the bar of the Court to answer the matter charged against him in an indictment.

ARRAY signifies the ranking or setting forth in order. A challenge to the array, as applied to juries and as distinguished from a challenge to the polls, signifies an exception or objection against all the persons arrayed or impaneled on a jury on account of partiality, or some default of the sheriff or his under officer who arrayed the panel.

ARREARS. From the French *arrière* (behind), denotes money remaining unpaid after it is due. Under the stat. 3 & 4 Will. 4, c. 27, six years is fixed as the amount of arrears of rent, dower, &c., which may be recovered out of the land, in respect of which the right to payment exists; but this does not prevent an action of covenant being brought under the stat. 3 & 4 Will. 4, c. 42, for twenty years' arrears. *Hunter v. Nockolds*, 1 Mac. & G. 640.

ARREST. From the French *arrêter* (to stop), signifies the restraint of a man's person by substituting for his own will the constraints of the law. Arrests may be either in civil or in criminal cases; for the latter, see title CONSTABLE.

Arrests in civil cases were either by writ of *capias* or by writ of *attachment*, the former being the more general, the latter issuing only in cases of a contempt of Court. Such arrests were also either on *mesne* process or on *final* process; but arrest on *mesne* process was abolished by the stat. 1 & 2 Vict. c. 110 (with certain exceptions specified in the Act), more latterly arrest on *final* process for debt has been abolished by the stat. 32 & 33 Vict. c. 62 (with certain exceptions specified in the Act).

Certain places, called Sanctuaries, *e.g.*, the Mint, the Savoy, &c., conferred a privilege from arrest; but such privileges were abolished by the stats. 8 & 9 Will. 3, c. 27; 9 Geo. 1, c. 28; and 1 Geo. 4, c. 116.

See also titles *CAPIAS*; *ATTACHMENT*.

ARREST OF JUDGMENT. The withholding or staying of judgment, notwithstanding a verdict has been given, on the ground that there is some error appearing on the face of the record, which vitiates the proceedings (*Steph. on Pleading*, 106, 6th ed. See example in *Roscorla v. Thomas* 6 Jur. 929). As a general rule the error must be one of substance, and not merely formal, the Statutes of Amendments and Jeofails excluding it in respect of the latter. The defendant is of course the party who moves in arrest of judgment.

In criminal cases the accused may at any time between conviction and sentence, but not afterwards, move in arrest of judgment, and the Court will even in certain cases of its own motion arrest the judgment. By the stat. 7 Geo. 4, c. 64, s. 20, many formal defects in an indictment are made demurrable only, and are no longer available as a ground of motion to arrest.

ARRESTMENT. The Scotch term for arresting. It is applied either to the person or to the effects. Arrestment of the person takes place in cases in which

ARRESTMENT—*continued.*

there is reason to apprehend that the person will leave the jurisdiction of the judge, and so deprive the creditor of the means of redress. Arrestment of the effects is that process of the law by which a creditor attaches the debt due to him, or the moveables belonging to his debtor in the hands of a third party.

See title GARNISHMENT.

ARRIAGE AND CARRIAGE were indefinite services formerly demandable from tenants, but prohibited by 20 Geo. 2, c. 50, ss. 21, 22.

ARSON. From the Latin *ardere* (to burn), is the offence of unlawfully or maliciously setting property on fire. By the ancient Common Law, the offence was of two degrees,—either, (1) Felony, where the defendant wilfully burnt the house of another, or, (2) Misdemeanour, where he wilfully burnt his own house, with the intention of burning that of another. By statutes passed at various periods, arson of every kind was made a capital felony, but the severity of the statute law was mitigated by the consolidation statutes 7 & 8 Geo. 4, c. 30, and 7 Will. 4 & 1 Vict. c. 89, according to which certain arsons were made capital felonies, and the rest felonies not capital. The present law is embodied in the statute 24 & 25 Vict. c. 97. See Arch. Pl. Crim. Cases (17th ed.) pp. 503–520.

ARTICULI CLERI. The name of an ancient statute, 9 Edw. 2, st. 1, concerning the liberties and franchises of the clergy. The petitions presented to the Star Chamber by Archbishop Bancroft, in 1605, being thought to present some analogy to the statute of the 9 Edw. 2, were called by Lord Coke by the same name. 1 Hall. Const. Hist. p. 324.

ARTICULI SUPER CHARTAS. The title of the stat. 28 Edw. 1, confirming Magna Charta and the Charta de Foresta, without the saving clauses which were contained in the Confirmatio Chartarum, 25 Edw. 1.

ARTICLED CLERK. Is a clerk under articles (*i.e.*, heads and particulars) of an agreement to serve a solicitor in consideration of being initiated into the routine and mystery of the profession. No one solicitor may have more than two articulated clerks at any one time (7 & 8 Vict. c. 73), but a firm of, say three, partners may have as many as six (3 × 2) such clerks among them, *viz.*, two to each partner, provided each is bound separately to one of the partners only, and not generally to all. Where the clerk is (as usually happens) at the date of the articles under age, his parent or guardian

ARTICLED CLERK—*continued.*

is usually made a party to the articles as well as himself.

See title ATTORNEY.

ASPORTATIS, DE BONIS: See title TRESPASS.

ASSASSINATION. Properly means murder accomplished with premeditation, or lying in wait. This is the definition of it given by the French law. Code Penal iii., 2, 1.

ASSAULT AND BATTERY. According to Hawk. P. C. i., c. 62, § 1, an assault is an attempt or offer to do a corporal hurt to another, as by striking him, or presenting a gun at him at carrying distance, or pointing a pitchfork at him which might reach him, or holding up one's fist at him, or doing any such like act in an angry threatening manner; and a battery is any injury whatsoever to the person of a man done in an angry, revengeful, rude, or insolent manner. An assault and battery is the combination of both offences. By the Common Law, an assault or battery is only a misdemeanour; but by the stat. 9 Geo. 4, c. 31, s. 25, and subsequently by the stat. 24 & 25 Vict. c. 100, certain aggravated assaults are made felonies, and certain others, although remaining misdemeanours, are visited with severer punishment.

Either an action at suit of the injured party, or an indictment at suit of the Crown, or both, may be brought or laid for the offence, and the police magistrates have also a summary jurisdiction over the offence.

ASSEMBLY, UNLAWFUL, is defined to be the meeting of three or more persons with the intention of doing an unlawful act.

See also title RIOT.

ASSESS. To fix or settle the amount of a tax or rate.

ASSESSED TAXES: See title TAXATION.

ASSESSMENT OF DAMAGES: See title DAMAGES.

ASSESSOR. A person learned in some particular science or industry, who sits beside the judge or other officer of a Court to assist him with his advice in the trial of a case requiring special knowledge.

ASSETS. See title ADMINISTRATION OF ASSETS.

ASSIGN. This word has three several and distinct meanings, as to which see the three following titles respectively.

ASSIGNMENT OF BREACHES. Where a contract (whether specialty or simple) is broken, and an action is brought upon it,

ASSIGNMENT OF BREACHES—*contd.*

it is necessary to state that the contract has been broken, and this statement of the breach is called the assignment of the breach; or, if the contract has been broken in more respects than one, then the statement of these respects is called the assignment of breaches. (Generally, this assignment should be made in the words of the covenant or promise, negatively or affirmatively, according as the words of the contract are affirmative or negative: and it is not safe or expedient to descend into details, excepting as examples of the prior general assignment. See Bull & Leake, Pl., 61-2.

ASSIGNMENT OF ERRORS. Upon proceedings in error (*see* that title), where the error is one of *fact*, it is necessary for the plaintiff in error to specify the particular alleged error or errors; and this is called the assignment of errors. The form of doing so is regulated by the C. L. P. Act, 1852, s. 158, Sch. A., form No. 12, which furnishes a general form of pleading, and also requires an affidavit in support, particularising the error or errors.

See also title ERROR.

ASSIGNMENT OF PERSONAL PROPERTY. This is the assigning over or transferring to another person the right or interest which one has in some matter or thing.

(1.) As applied to leasehold property or chattels real. *See* title CONVEYANCES. It was the rule of the Common Law, that all certain estates and interests in lands and tenements were assignable, but that mere titles, rights of entry, contingent interests, and possibilities, were not assignable (Co. Litt. 214 a, 266 a). But, under the stat. 8 & 9 Vict. c. 106, all such latter interests have become assignable.

(2.) As applied to personal property, and hereunder (a.) *In possession.* The assignment of that was always permitted by the Common Law, and is effected in the same way as the assignment of leaseholds.

(b.) *Not in possession.* Personal property not in possession is ordinarily designated a *chose in action* (*see* that title). By the Common Law, no such chose was assignable (Com. Dig. Assignment, c. 1, 2, 3); but in Equity every such chose is and always has been assignable, the Court requiring the assignor to perfect what he has done towards an assignment, and holding that an imperfect legal assignment is at any rate evidence of a contract to assign, which contract, when for value, the Court will enforce. But, as the result of gradual approximations on the part of Law to equitable principles—approximations attributable partly (as in the case of bills of

ASSIGNMENT OF PERSONAL PROPERTY—*continued.*

exchange) to mercantile usage, partly and chiefly (as in the case of policies of assurance) to statutes, in particular the culminating stat. 36 & 37 Vict. c. 66 (Judicature Act, 1873) s. 25, every chose in action is now become assignable equally in Law as in Equity.

ASSIGNS, or ASSIGNEES. These are the transferees under an assignment of personal property (*see* that title). They may be either (1.) general assignees, as in the case of bankruptcy, or (2.) particular assignees, as under a bill of sale (*see* both these titles). In cases of bankruptcy, they were either official assignees or trade, *i. e.*, creditors, assignees; but, under the Bankruptcy Act, 1869, the word *trustees* is substituted for that of assignee, and the registrar is made the official trustee, and the nominee of the creditors is called simply the trustee.

It is a rule of law that assignees of a chose in action take subject to the equities, and that they do so although particular assignees for value and without notice. As to how far covenants are binding upon or can be made to bind assignees, *see* title COVENANTS.

ASSISE. This word is derived from *assideo*, to sit together; and is usually taken for the Court, place, or time where the judges of the three superior Courts at Westminster try all questions of fact issuing out of those Courts that are ready for trial by jury. These assizes are, indeed, neither more nor less than the sittings of the judges at the various places where they visit on their circuits, and which they usually make four times in every year in the respective vacations after term. The word *assise* also sometimes denotes a jury, and sometimes denotes a *verdict*, as to all which, *see* succeeding titles.

ASSISA CADIT IN JURATAM. An assise was taken either "*in modum assise*," or "*in modum jurate*," in which latter case it was said to fall into a jury (*cadere in juratam*.) The difference between the two forms of assise appears to have been this: (1.) In nature, the very matter alleged by the plaintiff as his ground of claim was traversed in the *assise*, while in the *jurata* some fresh point was stated which went to destroy that ground of claim; and

(2.) In consequence,—the jury could not be attainted for false verdict in the *jurata*, whereas in the *assise* they might be attainted.

ASSISA CADIT IN PERAMBULATIONEM. The jury declaring their ignorance of the boundaries in a question of disputed boundaries, the judge would order

ASSISA CADIT IN PERAMBULATIONEM—*continued.*

a perambulation, with a view to ascertain the boundary; whence this phrase.

See titles VIEW, INSPECTION OF PROPERTY.

ASSISE DE UTRUM. This writ, which was called also *assisa jurum utrum*, lay for a person against a layman, or for a layman against a person, for lands or tenements, as to which it was doubtful whether they were lay-fees or free-alms. Cowel.

ASSISA PANIS ET CEREVISIE. This was the power of assising (at the time the judges on circuit assised) the weight of bread and the measures of beer. The stat. 51 Hen. 3, for fixing the price of bread and ale, was so called. Cowel; Tomlins.

ASSISE OF DARREIN PRESENTMENT. This was a writ which lay when a man or his ancestor had presented a clerk to a church, and after the church had become void by his death or otherwise a stranger presented his clerk to the church, in disturbance of the patron. F. N. B. 31 F.

ASSISE OF MORT D'ANCESTOR. A writ that lay when a man's father, sister, mother, brother, &c., died seised of lands, tenements, rents, &c., that were held in fee, and after their death a stranger caused an abatement. *See* title ABATEMENT.

ASSISE OF NOVEL DISSEISIN. A remedy for the recovery of lands or tenements of which the party himself had been disseised.

ASSISE OF NUISANCE. A writ which lay against a man to redress or remove a nuisance which he had created to the freehold of another, which the latter held for life, in tail, or in fee simple. F. N. B. 183, I.

ASSISE RENTS. Are the certain established rents of the freeholders and ancient copyholders of a manor, and are so called precisely because they are assised or certain.

ASSISTANCE: *See* title WRIT OF ASSISTANCE.

ASSOCIATE JUDGE. Under the stat. 15 & 16 Vict. c. 73, ss. 1-6, there is an associate in each of the Common Law Courts, appointed by the respective chiefs of these Courts. Each associate appoints two clerks for assisting him in the discharge of his duties, such latter appointments being subject to the approval of the chief of the Court. No associate may act as either a barrister, a solicitor, or an attorney.

ASSUMPSIT. Is a promise (not being under seal) by which one person assumes or takes upon him to do some act or pay something to another. *See* also next title.

ASSUMPSIT, ACTION OF. Is the form of action given by law to recover damages for the non-performance of contracts, either express or implied, and which are neither of record nor under seal. In origin, it was an action on the case for non-performance of an agreement; and in *Slade v. Morley*, 4 Rep. 92 b, 44 Eliz., it was settled that assumpsit might even be brought for a sum certain, although debt was the more natural form of action.

See also titles ACTION; SIMPLE CONTRACT.

ASSURANCE. This word is the same as Insurance, which *see*.

ATTACHMENT (*attachiamentum*). A taking, apprehending, or seizing by command of a judicial writ, termed a writ of attachment. The process of attachment was frequently resorted to in the Court of Chancery, to enforce the appearance of a party who had been served with a subpoena, and who had taken no notice of it; and under the present practice, the plaintiff may (although it is unusual to) exercise the same process against a defendant refusing to appear to the bill (1 Dan. Ch. Pr. 384-5). And generally, an attachment may issue in all cases for a contempt of Court, arising from a refusal to obey or to comply with its process.

ATTACHMENT, FOREIGN. This was a peculiar and ancient remedy open to creditors within the jurisdiction of the city of London, Exeter, and some other ancient cities, by which they were enabled to satisfy their own debts by attaching or seizing the money or goods of their debtor in the hands of a stranger or third person within the jurisdiction of such city. *McGrath v. Hardy* (4 Bing. N. C. 785), contains a very luminous statement of the proceedings in foreign attachment. The Lord Mayor's Court of the City of London still exercises very extensive powers of this character.

See also next title.

ATTACHMENT OF DEBTS. Under the stat. 17 & 18 Vict. c. 125, s. 60, a creditor who has obtained a judgment in a superior Court of Law may apply to the Court or a judge for a rule or order that the judgment debtor should be orally examined as to what debts are owing to him, and under s. 61, upon affidavit that the debt or debts are still unsatisfied, and that some third person (to be specified) within the jurisdiction is indebted to the defendants, the judge may order that all debts owing or accruing from such third person (called the garnishee) to the debtor shall be attached to answer the judgment debt. The stat. 33 & 34 Vict. c. 30, prohibits the attachment of wages.

ATTAINER. The taint, stain, or corruption of blood, which the law attaches to a criminal who is capitally condemned. He is then called attaint (*attinctus*), stained or blackened, and is no longer of any credit or reputation, and is considered already dead in law, and incapable of performing the functions of another man. The effect of an attainer used to be a forfeiture of the party's honours and dignities; he used to become degraded in the eye of the law, so that his children could not be heirs to him nor to any other ancestor through him, and these consequences could only be removed by authority of Parliament (Co. Litt. 391 b, s. 745). But under the Forfeiture for Felony Abolition Act, 1870 (33 & 34 Vict. c. 23), s. 1, no conviction for any treason or felony is to cause any attainer or corruption of blood, or any forfeiture or escheat.

ATTEMPT. Is defined in jurisprudence as that which, if not prevented, would have resulted in the full consummation of the act attempted. Wherefore there can be no attempt to steal a purse from an empty pocket (*B. v. Collins*, L. & C. 471); but an action of trespass for the assault may lie (see title ASSAULT), or a count for the misdemeanour may be framed; and generally all attempts to commit a felony, not being murder, which are frustrated may be treated as misdemeanours. And under the stat. 14 & 15 Vict. c. 100, s. 9, it is competent to the Court to convict of the attempt upon an indictment for the felony according to the evidence adduced at the trial.

ATTENDANCE OF WITNESSES. May be enforced by *subpena ad testificandum*, a refusal to obey which is a contempt of Court, and may be punished by attachment.

ATTENDANT TERMS. Terms of years created by the owner of the inheritance by way of mortgage, or otherwise, used when satisfied to become attendant upon the inheritance, either by operation of law, or by express declaration, for the protection of the inheritance. But under the Satisfied Terms Act (8 & 9 Vict. c. 112), all such terms are absolutely to cease for all purposes whatsoever, excepting that terms attendant by express declaration on the 31st of December, 1845, are to protect the inheritance as before.

See title SATISFIED TERMS.

ATTESTATION: See title EVIDENCE.

ATTESTING WITNESS: See title EVIDENCE.

ATTORNEY. One who is put in the place or stead of another to act for him.

ATTORNEY—continued.

There are two kinds of attorneys: one who acts in a private capacity, and is simply called an attorney while his authority to act for such other party is in existence (see title ATTORNEY, POWERS OF); the other, who acts in a public capacity as an officer in Her Majesty's Courts at Westminster, and who is called an attorney-at-law, and whose duty consists in transacting and superintending the legal business of his clients, as in prosecuting and defending actions at law, in furnishing his clients with legal advice, and in performing various other important matters connected with the practice of the law. Such latter attorneys are sometimes, and indeed more commonly called solicitors (see that title). Every attorney must have been an articulated clerk (see that title), and must have been admitted by the Master of the Rolls to the office of attorney; and must also take out annually a certificate to practise, paying the stamp imposed by the Stamp Act, 1870 (33 & 34 Vict. c. 97). Under the stat. 23 & 24 Vict. c. 27, being in the Law List is *prima facie* evidence of being duly qualified. Under the stat. 33 & 34 Vict. c. 28, a solicitor or attorney is enabled to make an agreement with respect to future (as he was already able with respect to past) costs; but all such agreements are subject to taxation.

See also titles LIEN; RETAINER; and TAXATION OF COSTS.

ATTORNEY, POWER OF. This is an instrument by which one person empowers another to act in his stead. The donor of the power is called the principal; the donee is called the attorney, or (when appointed by a corporation aggregate to receive administration) the syndic. A power of attorney which simply authorizes the attorney to vote is called a proxy; one which simply authorizes the attorney to appear in an action and confess the action or suffer judgment to go by default, is called a warrant of attorney. All other authorities are called simply powers of attorney, the power being special if it is to do one particular act, and general if it is to do generally all matters connected with a particular employment. And even where the power of attorney is general, a further special power of attorney is occasionally necessary, even for a matter comprised in the general power, e.g., in a foreclosure suit to receive the purchase-money (*Bourdillon v. Roche*, 27 L. J. (Ch.) 681); also in an action or suit in which money has been paid into Court, to receive that money out of Court (*Middleton v. Younger*, 22 L. J. (Ch.) 1005). And, again, a general power of attorney may be either limited, as when it leaves nothing to the discretion of the

ATTORNEY, POWER OF—continued.

attorney; or unlimited, as when it leaves everything to his discretion.

I. Persons capable of making attorneys.

An infant cannot execute a power of attorney, unless to do an act which is for his own benefit, e.g., to receive livery of seisin for him (*Palfriman v. Grobie*, 1 Roll. Abr. 730), not also to make livery for him, (*Whittingham's Case*, 8 Rep. 45a.), although at the age of fifteen years he may, under a custom, be able to make a feoffment in his own person. The guardian is able to appoint the infant's attorney (*Graham v. Madean*, 2 Curt. 659), and he may even be ordered to do so (*Ruck v. Barworth*, 25 L. T. 242).

A lunatic cannot execute a power of attorney; but where a person apparently sane at the time executes a general power of attorney, under which his attorney enters into a fair and *bona fide* contract on his behalf, such contract, after it is executed, cannot be set aside, although the principal should be afterwards found to have been a lunatic at the time of the execution of the power. *Ex parte Bradbury*, 1 Mont. & Ch. 625.

A married woman cannot execute a power of attorney; and if she join with her husband in executing one, the power of attorney is that of the husband alone, and therefore ceases with his death (*In re Jones*, 5 W. R. 336). But, so far as she has separate estate, whether existing by creation of equity, or in virtue of the M. W. P. Act, 1870 (33 & 34 Vict. c. 93), she is fully able to execute a power of attorney; but, *semble*, she has no such capacity in respect of the separate estate created upon judicial separation by the Act 20 & 21 Vict. c. 85 (*Faithorne v. Blaguire*, 6 M. & S. 73). And where a married woman is an executrix or administratrix, she must join her husband in the execution of a power of attorney (*Wms. Exors*, 5th ed. 869). But with reference to a fund in Court belonging to a married woman, she may, after being examined, execute a power of attorney directing a payment out of Court of the fund to her husband. *Allatt v. Bailey*, 1 W. R. 383.

Generally, also, when an act is intended to be personal to the party, he cannot constitute, by power of attorney or otherwise, a deputy to perform it for him, e.g., the doing of fealty (*Combes' Case*, 9 Rep. 76a); the duties of trustees (*Att.-Gen. v. Scott*, 1 Ves. Sen. 413); unless indeed, but only with reference to trustees, in a case of moral necessity (*Joy v. Campbell*, 1 Sch. & Lef. 341; *Stuart v. Norton*, 9 W. R. 320; *Hopkinson v. Roe*, 1 Beav. 180). Similarly, railway companies cannot, unless authorized by Parliament, delegate to another

ATTORNEY, POWER OF—continued.

company, or to other companies, the statutory powers conferred on themselves (*Winch v. Birkenhead, &c.*, Ry. Co., 16 Jur. 1035; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare, 306). Also, one joint tenant or tenant in common cannot appoint an attorney for himself and his co-tenants; but one partner may do so for himself and his co-partners in matters usual in the partnership (*Ex parte Mitchell*, 14 Ves. 597), but not in matters beyond what are usual. *Hambridge v. De la Crouce*, 4 D. & L. 466.

All other persons are capable of making attorneys.

II. Instrument constituting attorney.

An attorney to make or take livery, or to execute a deed, must be constituted by deed; and so also the attorney for a corporation aggregate in all matters of solemnity (*Dumpey v. Syms*, Cro. Eliz. 816). But an attorney of a corporation sole, and, generally, any private person who is capable of appointing an attorney at all, may appoint one by deed, writing not under seal, or parol, as he pleases, according as the greater or less solemnity of the occasion requires. *Ex parte Candy*, 5 L. J. (N. S.) Ch. 14.

It is not necessary that the attorney should be a party to the indenture constituting him. *Moyle v. Ever*, Cro. Eliz. 905.

It is competent to authorize the attorney to appoint a sub-attorney, and the substitute, when appointed, has full capacity. *Blandy v. Price*, 8 Jarm. Conv. 12, n. (s.).

The attestation of the execution of the deed constituting the attorney is generally by two witnesses, the Bank of England and certain other public bodies insisting upon that number, inasmuch as if a power of attorney is forged, it is a nullity as regards the misapparent principal. *Davis v. Bank of England*, 2 Bing. 398; 5 B. & C. 185.

When the power of attorney authorizes the doing of a certain act, it impliedly authorizes the doing also of everything properly incident to that act (*Bayley v. Wilkins*, 7 C. B. 886); e.g., a power to sell goods implies a power to receive payment on the sale (*Capel v. Thornton*, 3 C. & P. 352), and a power to manage a mine is an implied power to incur debts for wages (*Ex parte Chippendale, In re German Mining Company*, 4 De G. M. & G. 19). Nevertheless, the power is to be construed strictly, and therefore the attorney cannot bind his principal by any act beyond the scope of his authority (*Fenn v. Harrison*, 3 T. R. 757). e.g., a power to indorse bills remitted to the principal, or to indorse and negotiate such bills, would not authorize the making of acceptances (*Atwood v.*

ATTORNEY, POWER OF—continued.

Munnings, 7 B. & C. 278), nor will the general words which are usually thrown in at the end of the power be construed as enlarging the authority beyond matters strictly incident to the principal object of the power (*Esdaile v. La Nauze*, 1 V. & C. 394). However, when the attorney merely exceeds his authority, the excess alone is a nullity (Perkins, 189); and where he varies from the power, the variation, being immaterial, will not avoid the act. 1 Salk. 96.

A power of attorney is inherently revocable, and words purporting to make it not so are void for repugnancy (*Vynior's Case*, 8 Rep. 82 a.); nevertheless, when the power forms part of a security, or is for value, it is irrevocable (*Bromley v. Holland*, 7 Ves. 28). The revocation may be either express or implied; and if express, then by either party or by both, and either by deed, writing not under seal, or word of mouth, no matter in which of these ways it may itself have been created; and if implied, then by the exhaustion of the power, whether in substance or in time, or by the death of the person constituting the attorney. And with reference to death as an implied revocation, this distinction is taken, that when the power is a power simply, it is always revoked both at Law and in Equity; but when it forms part of a security, then it is revoked at Law (*Watson v. King*, 4 Camp. 272), but continues good in Equity (*Brasier v. Hudson*, 9 Sim. 1); and of course it is good both at Law and in Equity as to things already effected under it before the death. And, again, with regard to things effected after the death, but without notice of the death, these are good in Equity (*Hughes v. Walsley*, 12 Jur. 833); and of course, since the Judicature Act, 1873, at Law also, although formerly they were doubtfully so. Lastly, with regard to things done after the death, and with notice of the death, these are necessarily bad when the power is a power simply, but good when the power forms part of a security (*Kiddill v. Farnell*, 3 Sm. & Gif. 428). And see as to trustees and personal representatives, 22 & 23 Vict. c. 35, s. 26.

In executing a deed pursuant to his power, the attorney ought to seal and deliver, in the case of a simple power, in the name of his principal, e.g., "A. B., by his attorney, C. D.;" and in the case of a power forming part of a security, in his own name. Therefore, leases, submissions to an award, and such like, should be in the principal's name.

ATTORNEY-GENERAL. The head of the Bar.

ATTORNMENT (*attornamentum*). A

tenant's acknowledgment of his new landlord on the alienation of lands by the former landlord. It is of feudal origin, for by the feudal law the feudatory could not aliene or dispose of the feud without the consent of the lord, nor the lord aliene or transfer his seigniority without the consent of his feudatory (Bract. 41; Spelman, verb. *Attornamentum*). And generally to the validity of any grant of a seigniority, reversion, or remainder, the attornment of the tenant was necessary; inasmuch that if two successive grants were made of the same seigniority, reversion, or remainder, and the tenant attorned to the second grantee, the first grantee was defeated. Nor was there any legal means of compelling the tenant's attornment; but the grant might be made by fine, which dispensed with the necessity of attornment. However, by stat. 4 Anne, c. 16, ss. 9, 10, the necessity for attornment is dispensed with in all cases, although attornment is still permissible; and by the further stat. 11 Geo. 2, c. 19, s. 11, attornments are deprived of any tortious effect, when made to strangers claiming the land as against the rightful landlord. The payment of rent under a mistake as to the claimant's title is held not to amount to an attornment. *Gregory v. Doidge*, 3 Bing. 474.

AUCTION. This consists in the sale of lands or goods in public, as opposed to a sale thereof by private contract.

The sale of real estate by auction is now regulated by the 30 & 31 Vict. c. 48, the short contents of which Act are as follows:—

- (1.) No puffer is to be employed, otherwise the sale is void;
- (2.) The conditions of sale are to state whether or not the sale is without reserve; also,
- (3.) Whether or not a right to bid is reserved; and
- (4.) The practice of opening the biddings is abolished.

See also titles **CONDITIONS OF SALE**; **RESERVE**.

AUCTIONEER. Under the stats. 8 & 9 Vict. c. 15, and 27 & 28 Vict. c. 56, must have a licence. In case he have not himself (but through his clerk only (*Bird v. Boulter*, 4 B. & Ad. 443) signed the memorandum of agreement, he may sue the buyer (*Robinson v. Rutter*, 4 E. & B. 954); without prejudice, however, to the purchaser's right to set off any debt due from the principal (the vendor). *Coppen v. Craig*, 7 Taunt. 243.

AUDITÂ QUERELÂ. A writ which lies for a defendant, against whom judg-

AUDITÂ QUERELÂ—*continued.*

ment has been recovered, and who is therefore in danger of having execution issued against him, to relieve or discharge him upon shewing some good ground for discharge which has arisen since the recovery of such judgment, *e.g.*, a release. This remedy is now rarely resorted to, inasmuch as the Courts may now grant the like relief in a summary way upon motion.

The writ *auditâ querelâ* is a proceeding of common right and *ex debito iustitiæ*; but by the rules of H. T. 1853, r. 79. the writ is not allowed unless by rule of Court or judge's order.

By the C. L. P. Act, 1854, s. 84, any pleadable matter which arises after the time for pleading may be set up by way of *auditâ querelâ*.

In an *auditâ querelâ* the rule (if any) which the Court grants is absolute in the first instance. *Giles v. Hutt*, 1 Exch. 59.

AUGMENTATION, COURT OF. The name of a Court erected in 27 Henry 8, for the purpose that the King might be justly dealt with concerning the profits of such religious houses and their lands as were given to him by Act of Parliament in that year. The Court was so called because the revenues of the Crown were so much augmented by the suppression of such of the said religious houses as the King reserved to the Crown. *Les Termes de la Ley*.

AUTERFOIS ACQUIT. This is a plea pleaded by a criminal, signifying that he has been formerly acquitted on an indictment for the same alleged offence, it being a maxim of the Common Law of England, that no man's life is to be put in jeopardy more than once for the same offence. Co. 3 Inst.

See also next two titles.

AUTERFOIS ATTAINT. A plea by a criminal that he has been before attainted either for the same or some other offence. For wherever a man is attainted of felony by judgment of death, either upon a verdict or on confession, by outlawry, and formerly by abjuration, he may plead such attainder in bar to any subsequent indictment on appeal for the same or any other felony. The reason of this is, that any proceeding on a second prosecution cannot be to any purpose, as the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited all that he has.

AUTERFOIS CONVICT. A plea by a criminal that he has been before convicted of the same identical crime; it is similar in its nature to that mentioned in the last title but one.

AVERAGE. Is the contribution that merchants and others make towards the losses of those who have their goods cast into the sea for the safeguard of the ship or of the other goods and of the lives therein; it is called an average because it is proportioned after the rate of every man's goods carried.

Such average is either *general* or *gross* on the one hand, or *particular* and *petty* on the other; as to the former, *see* title **GENERAL AVERAGE**; and as to the latter, it arises when any particular damage is done to the cargo or vessel by accident or otherwise, such as the loss of an anchor or cable, the starting of a plank, or such like other particular losses which do not endanger the general safety. All such latter losses rest where they fall.

AVERIIS CAPTIS IN WITHERNAM. A writ for the taking of cattle to a person's use, who has had his own cattle taken by another, and driven out of the county where they were taken, so that they cannot be replevied. Reg. Orig. 82; Cowel.

AVERMENT. An allegation in pleading is so called.

AVOWRY: *See* title **REPLEVIN**.

AWARD: *See* title **ARBITRATION**.

B.

BACKING A WARRANT. The warrant of a justice of the peace cannot be enforced or executed in any other county than that in which he has jurisdiction, unless a justice of such other county wherein it is to be executed indorses or writes on the back of such warrant an authority for that purpose, which is thence termed backing the warrant. 2 Robinson's Mag. Assist. 572; 24 Geo. 3, c. 55; 5 Geo. 4, c. 18, s. 6.

BAIL (ballium). The setting at liberty of a person who is arrested in any action, formerly civil or criminal, but now only criminal, on his finding sureties for his re-appearance. It is, however, usually understood for the sureties themselves; as, if A. is arrested and puts in bail, this means that he has found persons who have become sureties for his re-appearance, and who take upon themselves the responsibility of his returning or not returning when required. There are or were several kinds of bail, of which the principal are the following: viz. (1.) *Bail below*, or *Bail to the sheriff*; (2.) *Bail above*, *Special Bail*, or *Bail to the action*; (3.) *Bail in error*; and (4.) *Common Bail*. Now, taking each of these four varieties of bail in order: (1.) *Bail below*, or to the sheriff, was such as a defendant put in when arrested upon a writ of *capias*. This he did by entering

BAIL—continued.

into a bond to the sheriff with sufficient sureties conditioned for his appearance within the period required by the writ, and which bond the sheriff was compelled by statute to accept, and to discharge the defendant out of custody. (2.) Bail above, special bail, or bail to the action, were persons whom the defendant procured to become his sureties for the ultimate payment of the debt and costs in the action, in the event of judgment passing against him, or as an alternative that he should surrender himself to prison. They were termed bail to the action because they were responsible for the defendant's abiding by the event of the action, and obeying the judgment of the Court therein, in contradistinction to bail to the sheriff, who only undertook that the defendant should appear according to the exigency of the writ, and provide bail to the action. The undertaking of the sureties, or bail above, was drawn upon a piece of parchment by the defendant's attorney, and was technically termed the bail piece. (3.) Bail in error. These were sureties whom a party prosecuting a writ of error, commonly called the plaintiff in error, was required to find, and who undertook that the plaintiff in error should prosecute his writ of error with effect, and that in case the plaintiff was *non pro-ed*, or the judgment in the Court below was affirmed, he should pay all the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded by reason of the delay of execution on such former judgment (3 Jac. 1, c. 8; 3 Car. 1, c. 4, s. 4; 19 Geo. 3, c. 70; 6 Geo. 4, c. 98, ss. 1, 4). Common bail signified an appearance, for an explanation of which see that title; and see also next title.

BAIL IN CRIMINAL PROCEEDINGS.

Upon application to the Court of Queen's Bench, or to a judge thereof, the Court or a judge may, as a favour, admit the prisoner to bail, and that even in non-bailable proceedings. But generally, in all cases of misdemeanour, the accused has an absolute right to be discharged from his interim custody upon finding sufficient bail.

BAIL À CHEPTEL**BAIL À FERME****BAIL À LOYER**

} See title LOUAGE.

BAIL COURT. An auxiliary court of the Court of Queen's Bench, at Westminster, wherein points connected more particularly with pleading and practice are argued and determined.

BAILIFF. There are various sorts of bailiffs; as bailiffs of liberties, sheriff's bailiffs, bailiffs of lords of manors, &c., &c. Sheriffs are also called the king's bailiffs, and the counties wherein it is their duty

BAILIFF—continued.

to preserve the rights of the king are frequently called their bailiwicks, a word introduced by the Norman princes in imitation of the French, whose territory was divided into bailiwicks, as that of England is into counties. The word "bailiff," however, usually signifies sheriff's officers, who are either, (1.) Bailiffs of hundreds, or, (2.) Special bailiffs. (1.) Bailiffs of hundreds are officers appointed over those respective districts, by the sheriffs, to collect fines therein, to summon juries, to attend the judges and justices at the assizes or quarter sessions, and also to execute writs and processes in the several hundreds. (2.) Special bailiffs are that lower class of persons employed by the sheriffs for the express purpose of serving writs and making arrests and executions, &c. (3.) Those persons also who have the custody of the king's castles are called bailiffs, as the bailiff of Dover Castle. (4.) The chief magistrates of particular jurisdictions are also called bailiffs, as the bailiff of Westminster, for example. (5.) There are also bailiffs of courts baron, bailiffs of the forest, &c. Cowel; *Termes de la Ley*.

BAILMENT. This is the most general word in English law for agency, and comprises the following varieties of agency:—

(1.) Gratuitous bailment,—in which case it is settled that a *misfeasance* on the part of the bailee, i.e., agent, is actionable (*Coggs v. Bernard*, 1 Sm. L. C. 177); but that a mere non-feasance is not actionable. *Elisee v. Gatuward*, 5 T. R. 148.

(2.) Bailment for reward,—in which case the bailee is of course liable as well for a non-feasance, as for a misfeasance, and cannot recover his recompense until his performance of the duty which he has undertaken.

Again, bailment comprises the following varieties of agency:—

(1.) Bailments in which the trust reposed is exclusively for the benefit of the bailor, and hereunder *Mandatum* and *Depositum*, as to which, see these two titles.

(2.) Bailments in which the trust reposed is exclusively for the benefit of the bailee, and hereunder *Commodatum* (or *Prêt à usage*), and (where gratuitous) *Mutuum* (or *Prêt à consommation*), as to which, see these two titles; and

(3.) Bailments which are for the benefit of both bailor and bailee, and hereunder the following varieties (as to which, see the respective titles), viz. :—

- (1.) *Pledge* or *Pawn*,—PAWNBROKERS.
- (2.) *Custody*,—INNKEEPERS; and
- (3.) *Carriage*,—CARRIERS.

BAITING ANIMALS: See CRUELTY TO ANIMALS.

BALLOT, VOTE BY. Under the stat. 35 & 36 Vict. c. 33, all parliamentary and municipal elections are required to be made by ballot; and under the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the elections are similarly required to be by ballot.

This mode of voting was one of the five points advanced by the so-called Chartists, in 1839, as the People's Charter; the four other points being universal suffrage, annual parliaments, payment of members, and the abolition of the property qualification for members of parliament.

See also title REPRESENTATION.

BANC, or BANCO, SITTING IN. The sittings which the respective superior Courts of Common Law hold during every term, and on certain appointed days after term, for the purpose of hearing and determining the various matters of LAW argued before them, are so called, in contradistinction to the sittings at Nisi Prius, which are held for the purpose of trying issues of FACT. The former are usually held before four of the judges; at the latter, one judge only presides.

BANKERS. According to the decision in *Foley v. Hill* (2 H. L. C. 28), the relation between a banker and a customer who pays money into the bank, is the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the drafts of customers, and that relation is not altered by an agreement by the banker to allow interest on the balances in the bank. The relation does not partake of a fiduciary relation, and therefore, as a general rule, no bill in equity will lie against a banker for an account.

See also titles BILLS OF EXCHANGE; CHEQUES; CASH NOTES; CIRCULAR NOTES; and LETTERS OF CREDIT.

BANKS, JOINT STOCK. By the 39 & 40 Geo. 3, c. 28, s. 15, it was forbidden to establish any corporate bank whatever, or any bank where the number of partners exceeded six, so as to borrow, owe, or take up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months, during such time as the Bank of England enjoyed the rights conferred by former Acts. But in 1826, the 7 Geo. 4, c. 46, was passed legalizing the formation under deeds of settlement, of banking co-partnerships consisting of more than six persons, provided they did not carry on business in, or within sixty-five miles of, London. Afterwards, in 1845, was passed the 7 & 8 Vict. c. 113, which for a short time enabled joint-stock banks to be established under letters patent of incorporation. And latterly, the

BANKS, JOINT STOCK²—continued.

Joint Stock Banking Companies Act, 1857 (21 & 22 Vict. c. 49), and Companies Act, 1862 (25 & 26 Vict. c. 89), have afforded every facility for constituting joint stock banks in every part of England, subject to the provisions of these Acts.

BANK NOTES. These are a legal tender in England for all sums over £5: See title CASH NOTE, 3 & 4 Will. 4, c. 98, s. 6. In case a bank note is lost, or is stolen, or is otherwise improperly obtained, the Bank of England, upon presentment by a *bona fide* holder, is bound to cash it, although to the prejudice of the true owner. *Miller v. Race*, 1 Sm. L. C. 468.

BANKRUPTCY. Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which commenced as from the 1st of January, 1870, but which does not extend to Scotland or Ireland, any one, whether a trader or not, and whether a member of Parliament or not, may be adjudicated a bankrupt (s. 6) upon the petition of his creditor or creditors, upon any one or other of the following six grounds,—commonly designated “acts of bankruptcy:”—

- (1.) Making a conveyance or assignment of all his property for the benefit of his creditors generally;
- (2.) Making any fraudulent conveyance or assignment;
- (3.) Doing any act with intent to defeat or delay his creditors;
- (4.) Filing a declaration of insolvency;
- (5.) Having execution levied by seizure and sale of his goods for a debt of £50, or upwards; or
- (6.) Having, if a trader for seven days, and if a non-trader for twenty-one days, after service of a debtor's summons for a debt of not less than £50, neglected to pay or satisfy same.

The petition grounded upon any one of such acts must be presented within six months from the commission of the act.

The Act constitutes two distinct jurisdictions, viz.:—

- (1.) The London district,—which comprises the City of London and its liberties, and all places situated within the districts of the metropolitan County Courts; and
- (2.) The country district,—which comprises the rest of England.

The Court of the London Bankruptcy District has all the powers and jurisdictions of the superior Courts of Common Law and Equity (*In re Anderson*, L. R. 5 Ch. App. 473); the Judge may also reverse, vary, or affirm any order of a local Bankruptcy Court, in respect of a matter either of law or of fact.

BANKRUPTCY—*continued.*

When a person is adjudicated a bankrupt, all his property, whether real or personal, vests in the trustee or trustees, who have the following powers:—

- (1.) Receiving and deciding upon proof of debts.
- (2.) Carrying on the business of the bankrupt.
- (3.) Bringing or defending actions.
- (4.) Selling the property of the bankrupt, either by public auction or by private contract; and
- (5.) Giving effectual receipts for money received.

Upon the close of the bankruptcy, or (but only with the assent of his creditors), during its continuance, the bankrupt may apply to the Court for an *order of discharge*, which he will obtain if he have paid 10s. in the pound, and not unless; if undischarged, he is protected for three years from the close of the bankruptcy proceedings, and if he should during that period have paid up to 10s. in the pound, he then obtains his discharge; but otherwise, the unpaid balance becomes a judgment debt against him, and may be levied against his property, real or personal, in the usual way.

BANNERET, or BANRENT. A banneret, or banrent, is said to be a knight made in the field, with the ceremony of cutting off the point of his standard, and so making it like a banner. They are accounted so honourable that they are permitted to display their arms in a banner in the field as barons do. See Selden's Tit. of Hon.

BARGAIN AND SALE: See title CONVEYANCES.

BARON AND FEME: See title HUSBAND AND WIFE.

BARRATEY. Any act of the master or of the mariners of a ship which is of a criminal or fraudulent nature, tending to the prejudice of the owners of the ship, without their consent or privity; as by running away with the ship, sinking her, deserting her, or embezzling the cargo. *Park on Ins.* 137, 138; *Knight v. Cambridge*, 1 Str. 581; *Vallejo and Another v. Wheeler*, Cowp. 143.

BARRING ESTATE TAIL. Formerly, an estate tail could only be barred by levying a fine or suffering a common recovery (see these titles). At the present day, it can only be barred (1.) in the case of freeholds, by a disentailing deed, and (2.), in the case of copyholds, by surrender, or (but only if the estate is equitable) by a disentailing deed executed in accordance with the stat. 3 & 4 Will. 4, c. 74. Therefore neither a will, nor a contract of sale, nor any other

BARRING ESTATE TAIL—*continued.*

deed or instrument in writing whatsoever, not being a special Act of Parliament, is of any force or efficacy whatsoever, unless preceded by the proper statutory mode of bar, to pass or to convey an estate tail to the devisee or contractee, or other person whatsoever; nor may the Courts of Equity, in favour of a purchaser for value, execute the contract by decreeing the heir in tail to carry out the act which his ancestor has left incomplete, and it need scarcely be added that the Courts of Equity would not, even if they might, decree a disentailing deed in favour of the devisee, who is a mere volunteer.

BARRISTER. A counsellor learned in the law who pleads at the bar of the Courts, and takes upon himself the advocacy or defence of causes. His professional conduct is under the control of the Benchers of his Inn (*Hudson v. Slade*, 3 F. & F. 390). His fees are an *honorarium*, and no action lies to recover them, nor can any security be taken for them (*Brown v. Kennedy*, 13 C. B. 677). But it is otherwise with the fees of conveyancers or special pleaders below the bar, who may maintain an action, or take such security (*Steadman v. Hockley*, 15 M. & W. 553). A barrister is not liable for negligence or non-attendance (*Fell v. Brown, Peake*, 96). He enjoys numerous privileges (which, however, he is assumed to exercise only for the benefit of his client), e.g., he may compromise the case (*Swinfen v. Swinfen*, 1 C. B. (N.S.) 364; 2 De G. & J. 381); nor is he exposed to any action for libel or slander, in consequence of words written or spoken by him in the conduct of his case (*Hodgson v. Scarlet*, 1 B. & A. 232); nevertheless it seems that he is liable to be punished for contempt of Court even for words professedly spoken in the discharge of his functions as advocate (*Ex parte Pater*, 5 B. & S. 299). He is privileged from arrest while attending Court or going circuit.

BASE FEE. A base or qualified fee is an estate which hath some qualification subjoined thereto, and which must cease or be determined whenever such qualification is at an end. As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI. granted to John Talbot, *lord of the manor of Kingston-Lisle, in Berks*, that he and his heirs, *lords of the said manor*, should be peers of the realm by the title of Barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seigniorship of that manor, the

BASE FEE—continued.

dignity was at an end. These estates are fees, because it is possible that they may endure for ever in a man and his heirs; yet as that duration depends on certain collateral circumstances which qualify and debase the purity of the donation, it is therefore called a base or qualified fee. In a more limited sense, a base fee is used to denote a fee simple derived out of a fee tail, which has been barred by one whose power extends only to bar his own issue heirs in tail; in this case, so long as such heirs in tail or their issue endure, the fee simple endures, but determines when they become extinct.

BASTARD. A child born out of wedlock. He is not legitimized by the subsequent marriage of his parents (*Doe d. Birtwhistle v. Vardell*, 6 Bing. N. C. 385). Upon an order of affiliation, the putative father becomes liable to a limited extent to support his child; but otherwise the mother must support it. The custody of the child belongs also of right to the mother, notwithstanding the father is able and willing to maintain it better (*Ex parte Knes*, 1 N. R. 148); but it seems that the wishes of the child itself will be consulted. *In re Lloyd*, 3 Man. & G. 547.

BATTLE (from *battaille*). The trial by wager of battle was a species of trial introduced into England, among other Norman customs, by William the Conqueror, in which the person accused fought with his accuser, under the apprehension that Heaven would give the victory to him who was in the right.

See title TRIAL BY JURY.

BATTERY: See ASSAULT AND BATTERY.

BAWDY-HOUSE: See BROTHEL.

BENCH WARRANT. The process issued against a party against whom an indictment has been found for the purpose of bringing him into Court to answer the charge preferred against him. When an indictment has been found for a misdemeanour during the assizes or sessions, it is the practice for the judge attending the assizes, or for two of the justices attending the sessions, to issue a bench warrant, signed by him or them, to apprehend the defendant. Cowp. 239; Haw. Pl. Cr.; 1 Ch. Crim. Law, 338, 339.

BENCHER. A dignitary of the Inns of Court is so termed. Each Inn of Court is presided over by a certain number of benchers, who exercise the right of admitting candidates as members of their society, and also of ultimately calling them to the bar. They are usually selected from those of their members who have distinguished

BENCHER—continued.

themselves in their profession; and it is the ordinary practice, but subject to a discretion in the body of benchers, for each Inn of Court to select its member a bencher as soon as he has attained the rank or degree of queen's counsel. They also exercise a general supervision over the professional conduct of all counsel that are members of the Inn.

BENEFICE. Generally taken for any ecclesiastical living, or church preferment, whether a dignity or not; and it must be given for life, not for years, or at will.

See title ADVOWSON.

BÉNÉFICE D'INVENTAIRE. This in French law corresponds to the *Beneficium Inventarii* of Roman law, and substantially to the English law doctrine, that the executor properly accounting is only liable to the extent of the assets received by him.

BETTING HOUSES. These were suppressed in England by the 16 & 17 Vict. c. 119; and in Scotland by an Act of the present session.

BEYOND THE SEAS. No part of the United Kingdom of Great Britain and Ireland, nor the Isle of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them (being part of the dominions of Her Majesty), are deemed beyond the seas within the meaning of the 3 & 4 Will. 4, c. 27. And yet for certain purposes either or any of those places other than England may be regarded in law as being beyond the seas. Thus it appears to have been held that Dublin, or any place in Ireland, was beyond the seas within the meaning of the Statute of Limitations (21 Jac. 1, c. 16). *King v. Walker*, 1 Bl. Rep. 286; *Nightingale v. Adams*, Shaw. 91; Shelford's Real Property Statutes, 181, 4th ed.

BIGAMY. A criminal offence which consists in going through the ceremony of marriage with another, while a former husband or wife is still alive and not divorced, knowing at the time, or reasonably believing, that such former consort is still alive. The offence amounts to a felony, and is punishable with penal servitude for not more than seven nor fewer than five years, or with imprisonment with or without hard labour for any period not exceeding two years.

BILL (*billā*) has various significations in law proceedings. It is commonly taken for a declaration in writing, expressing either the wrong the complainant has suffered by the defendant, or else some fault that the party complained of has

BILL—*continued*.

committed against some law or statute of the realm. Such bills are sometimes addressed or exhibited to the Lord Chancellor, especially where the wrongs done to the complainant are matters of conscience; and sometimes they are addressed and preferred to others having jurisdiction in the matter, according as the law whereon they are grounded directs. This bill contains a statement of the fact complained of, and of the damages thereby suffered, and a petition that process may issue against the defendant for redress. In criminal matters, when a grand jury, upon any presentment or indictment, consider the same to be probably true, they write on it two words, *billā vera*, in other words, they are said to *find a true bill*, and thereupon the accused party is said to stand indicted of the crime, and is bound to make answer to it; and if the crime concern the life of the person indicted, it is then referred to another inquest, called the jury of life and death, by whom, should he be found guilty, he stands convicted of the crime, and is by the judge condemned accordingly. Bill is also a common engagement for money given by one man to another; and is sometimes with a penalty, called a penal bill, and sometimes without a penalty, when it is termed a single bill. By a bill was commonly understood a single bond without a condition; and it was formerly the same as an obligation, save that it was called bill when in English, and an obligation when in Latin.

See following titles.

BILL FOR DISCOVERY: *See* title DISCOVERY.

BILL IN EQUITY OR CHANCERY. The method of instituting a suit in the Court of Chancery is by addressing a bill, in the nature of a petition, to the Lord Chancellor. This bill is neither more nor less than a statement of all the circumstances which gave rise to the complaint, and a prayer or petition for particular relief, according to the case made by the bill, or for general relief, according as the nature of the case may require. When this bill is drawn up or prepared, it is left with the proper officer of the Court in order to be filed, and this is what is termed filing a bill in Equity. Bills in Equity are all of the same general character, but some of them being of a secondary nature to the principal bill, have acquired names descriptive of that secondary nature, *e.g.*, Cross Bills, Supplemental Bills, Bills of Revivor, Bills for Discovery, &c., all which titles *see*.

Hitherto a bill has been a method of originating proceedings in Chancery, and indeed in cases where the summary—*i.e.*,

BILL IN EQUITY OR CHANCERY—*continued*.

statutory—proceeding by petition or summons was not available, the bill was the only process, but at the same time a universal process, of initiating proceedings. However, now, under the Judicature Act, 1873, all actions and suits are to be commenced by a writ of summons; but the operation of the Act has been postponed.

BILL OF EXCEPTIONS. If during a trial a judge, in his direction to the jury, or in his decision, mistakes the law, either through ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions, which is a statement in writing of the point wherein he has committed the error, and which statement, by fixing his seal thereto, he thus acknowledges (Smith's Action at Law, p. 82). This statement should be put in writing while the Court is sitting, and in the presence of the judge who tried the cause, and signed by the counsel on each side; after which it is formally drawn up and tendered to the judge to be sealed. A bill of exceptions is said to be in the nature of an appeal from the judgment or decision of the Court below to a Court of error. (*Wright v. Sharp*, 1 Salk. 288; *Gardner v. Bailey*, 1 Bos. & P. 32; *Wright v. Tatham*, 7 A. & E. 331). By the Judicature Act, 1873, bills of exception are abolished, and an appeal to the Court of Appeal substituted for them; but the operation of the Act has been postponed.

BILL OF EXCHANGE. A bill of exchange is defined by Blackstone to be an "open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account." The person who draws or makes the bill is called the drawer; the person to whom it is addressed is called the drawee; and when the drawee has undertaken to pay the amount (which undertaking he signifies by writing across the bill of exchange the word "accepted" together with his name, with or without adding the place where the money is to be paid), then he is called the acceptor; the person to whom the money is ordered to be paid is called the payee; and if the payee transfers it over to another (which he does by simply writing his name across the back), he is then called the indorser, and the person to whom he thus transfers it is called the indorsee, which latter person may also, if he pleases, in his turn transfer it to another party (by the same process of signing his name on the back, or indorsing it, as it is termed), and thus it may be transferred from one person to another *ad infinitum*, the party transferring it always being called the indorser,

BILL OF EXCHANGE—continued.

and the party to whom it is transferred the indorsee. To illustrate the subject further, a common form of a bill of exchange is here given:—

£100.

London, June 1, 1874.

One month after date pay to George Montague, or order, the sum of one hundred pounds, and place the same to my account.

JOHN SMITH.

To Mr. John Harrison,
Merchant,
50, Broad Street.

Now in the above form, "John Smith" is the drawer of the bill, "John Harrison" is the drawee, and when he has signified his acceptance of the bill by writing across the face of it

Accepted,
"John Harrison,"

he is then also termed the acceptor; and "George Montague" is the payee. When the acceptor of a bill of exchange is a man of substance and of good credit, it renders it easily negotiable, and consequently almost as valuable as a bank note. Chitty on Bills of Exchange.

See also titles ACCEPTANCE; INDORSEMENT; ACCOMMODATION BILL; FOREIGN BILL; USAGE; NOTICE OF DISHONOUR; PROTEST.

BILL OF LADING. This is a document which is signed and delivered by the shipowner, or master as his agent, to the shipper in a general ship on the goods being shipped; or, speaking more practically, upon the goods being shipped, the mate gives the shipper an acknowledgment thereof, which is called the "mate's receipt," and the shipper takes that to the broker or captain of the ship, who exchanges it for the bill of lading.

Form of Bill of Lading.—A bill of lading is commonly made out in parts. One or more of these parts are sent by the shipper to the consignee of the goods, one is retained by the shipper in his own custody, and another is given to the master, shipowner, or captain. The bill, after mentioning the shipping of the goods in good order and condition, and their destination, undertakes to deliver same in like order and condition to the consignee or his assigns, upon payment by the latter of the agreed freight.

Incidents of Bill of Lading.—A bill of lading may be indorsed, and thereafter, upon being delivered, it passes to the indorsee the property in the goods to which it relates; and since the Act 18 & 19 Vict. c. 111, the indorsee may sue thereon in his own name, and not, as heretofore, in the

BILL OF LADING—continued.

name of the indorser only. The actual holder of a bill of lading, although insolvent, may even defeat by a *bonâ fide* indorsement, accompanied with delivery of the bill of lading, the right of the unpaid consignor or vendor to stop the goods *in transitu*; and for this purpose it is not material that the indorsee knows that the consignor has not been paid for the goods in money, if he does not know that the consignee is insolvent, or that the bills given in payment are bad (*Cuming v. Brown*, 9 East, 506). No property, however, passes by the indorsement if there is fraud in the transfer, or if there is notice by the previous indorsement that the earlier transfer is conditional only, or if the indorsee knows of the insolvency of the consignee (*Vertue v. Jewell*, 4 Camp. 31). Nor can the *bonâ fide* indorsee for value interfere by virtue of the indorsement to him with the stoppage *in transitu*, if the person through whom the bill of lading came to him had no authority from the shipper or consignee to put it in circulation (*Gurney v. Behrend*, 3 E. & B. 622), the bill of lading being in this respect like an overdue bill of exchange. And it is expressly provided by the 18 & 19 Vict. c. 111, s. 2, that the extension which that Act gives to the rights and liabilities of the indorsee shall not affect in any way the right of stoppage *in transitu*. Where the bill of lading is negotiated by way of pledge, the right to stop *in transitu* may be gone at Law (and the better opinion seems that it is); but it remains in Equity, subject to the pledgee's rights in respect of his specific advance. *In re Westsanthus*, 5 B. & Ad. 817.

A bill of lading, after indorsement, is countermandable before actual delivery thereof or of the goods to the indorsee; but, after an indorsement and delivery of the bill of lading and invoice of the goods as a security against bills which are to be drawn by the indorsers on the indorsees, the indorsers cannot, after having obtained the acceptances, and whilst the balance of accounts is in favour of the indorsees, countermand the delivery of the goods, and the master of a ship would be liable in trover if he acted under any such order (*Hatfield v. Smith*, 1 B. & P. 563). But, *semble*, it would be otherwise if the balance of accounts were the other way.

BILL OF MIDDLESEX. A species of process by which actions were formerly commenced in the Court of Queen's Bench. It was a kind of precept directed to the sheriff of the county, commanding him to take the body of the defendant and have it, on a certain day therein-mentioned, in Court, wheresoever the lord the king should be

BILL OF MIDDLESEX—continued.

in England (Boote's Suit at Law, 38). This mode of proceeding was abolished by the Uniformity of Process Act, 2 Will. 4, c. 39.

BILL OF PEACE. These are bills in the nature of bills *quia timet* (which title see), but which are most commonly brought after the right has been tried at Law. The bill is brought for the purpose of establishing and perpetuating a right claimed by the plaintiff, the right being of a nature to be controverted by different persons, at different times, and by different actions. The design of the bill is to secure repose from perpetual litigation, or the fear thereof, and is justified by the doctrine of public policy that there should be an end to litigation. Thus, the lord of a manor may bring such a bill against his tenants in regard of an encroachment; and see *Sheffield Waterworks Co. v. Yeomans*, L. R. 2 Ch. App. 8, and compare *Earl of Bath v. Sherwin*, Prec. Ch. 26.

BILL OF RIGHTS. The statute 1 Will. & Mary, stat. 2, c. 2, is so termed because it declares the true rights of British subjects. The short contents of it are as follows: After reciting the various unconstitutional and illegal acts of the preceding Stuart reigns, it goes on to enact as follows:—

- (1.) The suspending power, when exercised by the Crown without the assent of Parliament is illegal;
- (2.) The dispensing power, as of late exercised, is illegal;
- (3.) Levying money by prerogative is illegal;
- (4.) The subjects have a right to petition the Crown, and all commitments for so petitioning are illegal;
- (5.) Raising or maintaining a standing army within the kingdom in time of peace is illegal, if done without the assent of Parliament;
- (6.) Freedom of speech in Parliament secured; and
- (7.) Excessive bail, excessive fines, &c., &c., discouraged.

BILL OF SALE. Is an instrument whereby one person called the assignor assigns, or purports to assign, to another person called the assignee, personal property or chattels, either conditionally, i.e., by way of mortgage, or absolutely, i.e., by way of sale or gift outright. See titles **ASSIGNMENT OF PERSONAL PROPERTY**; **CONVEYANCES**.

Under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 56), every bill of sale requires to be registered within twenty-one days from the making thereof, otherwise the same is void as against execution creditors,

BILL OF SALE—continued.

the trustee in bankruptcy, and others. Under the Amendment Act, 1866 (29 & 30 Vict. c. 96), it requires to be re-registered every five years. And even then, without possession taken prior to an act of bankruptcy, it is void as against the trustee in bankruptcy. *Badger v. Shaw*, 2 El. & El. 472, following *Stanfield v. Cubitt*, 27 L. J. (Ch.) 266.

This strictness of the law is due to the fact, that fictitious bills of sale are often given for the purpose of effectuating a fraud. In *Edwards v. Harben* (2 T. R. 587), following *Twyne's Case* (1 Sm. L. C. 1), the retention of possession by the maker was accepted as an index of fraud. The bill of sale is, however, in all cases good as between the parties. *Bessey v. Wincham*, 6 Q. B. 166.

BILL, PARLIAMENTARY. A parliamentary bill has been described as the "draft or skeleton of a statute." Bills are divided into two classes, viz., public and private bills. The former are such as involve the interests of the public at large, and when passed by all the three branches of the Legislature, become a portion of the public statutes of the realm; the latter are such as have reference to the interests of private individuals, and are frequently introduced to enable them to undertake works of public utility at their own risk; such, for instance, are the various bills introduced for the purpose of establishing railway companies; such also are those of naturalization, for change of name, for divorce, &c. See May's Treatise on Parl., although all, or the majority, of these latter purposes, are now partly accomplished in virtue of public or general statutes, see Lands Clauses Consolidation Act, 1845, &c.

BILL OF PARTICULARS. A bill of particulars, or, as it is frequently termed, a particular of plaintiff's demand, is a statement in writing of what the plaintiff seeks to recover in his action. Its object is to furnish the defendant with a better or more specific statement of the plaintiff's cause of action than is to be collected from the declaration or summons. The bill of particulars "differs from the declaration, inasmuch as the one discloses the nature and legal effect of the plaintiff's claim, the other its component ingredients." Lush's Pr. 374; *Pyrie v. Stevens*, 6 Mee. & W. 814, per Curiam.

BILL OF REVIVOR: See title **REVIVOR**.

BIRTH. By the statute 6 & 7 Will. 4, c. 86, it is provided that the certified copies of entries, purporting to be sealed with the seal of the Registrar-General's office, shall be evidence of the birth [death, or marriage], to which the same relates, without

BIRTH—continued.

any further or other proof of such entry. An affidavit of identity must, however, accompany the extract as proof of the birth [death, or marriage]. *Parkinson v. Francis*, 15 Sim. 160.

In criminal law, the concealment of a birth is, under 24 & 25 Vict. c. 100, s. 60, a misdemeanour; and as such is punishable with imprisonment for any term not exceeding two years, with or without hard labour.

BISHOP. A dignitary of the church who has episcopal jurisdiction within his diocese, but which jurisdiction he commonly exercises through his chancellor or commissary.

See titles **ECCLIESIASTICAL COURTS**;
ARCHBISHOP.

BLASPHEMY. To revile at or to deny the truth of Christianity as by law established is a blasphemy, and as such is punishable by the common law. Under the stat. 9 & 10 Will. 3, c. 32, cited in the Stats. Rev. as 9 Will. 3, c. 35, any professed Christian who denies the Holy Trinity, or generally the Christian religion, may be indicted for the same, and upon conviction is liable to be deprived of office and incapacitated for holding future office; but the prosecution requires to be commenced within four days of the blasphemy spoken; and is to be desisted from, and all the penalties are to be removed, upon the defendant's renunciation of his heretical opinions.

BLOCKADE. A blockade in law must be an actual or effective blockade, and not a paper blockade merely; in other words, a port is blockaded when a squadron is in the vicinity of it for the purpose of preventing ingress into and egress from it, and not when it is merely declared to be under blockade. A violation of blockade requires three things—(1.) That the blockade be effective; (2.) That the accused had notice thereof; and (3.), That he made ingress or egress in disregard of the blockade.

BOARDING-HOUSE. The keeper of such a house is bound to take ordinary care of the goods of his guest therein, and will be liable for negligence occasioning loss (*Dancey v. Richardson*, 2 El. & Bl. 144); but his liability is not so extreme as that of an innkeeper (*Holden v. Souby*, 8 W. R. 438). A contract for board and lodging is not a contract regarding land within the meaning of the Statute of Frauds. *Wright v. Stavart*, 8 W. R. 413.

BOARD OF HEALTH. Under the stats. 11 & 12 Vict. c. 63 (*Public Health Act*, 1848), 21 & 22 Vict. c. 98 (*Local Government Act*, 1858), and other Acts amending same, local boards are constituted for the

BOARD OF HEALTH—continued.

better securing the public health, and who for that purpose exercise certain powers as to sewers, drains, buildings, slaughter-houses, &c.

BOARD OF TRADE. One of the administrative departments of the Government, constituted by the Acts 22 Geo. 3, c. 82, and 24 & 25 Vict. cc. 45 & 47, and possessing under various statutes a very general jurisdiction and superintendence over railways, merchant shipping and seamen, harbours, fisheries, &c.

BOARD OF WORKS. The name of a board of officers appointed for the better local management of the metropolis. They have the care and management of all grounds and gardens dedicated to the use of the inhabitants in the metropolis; also, the superintendence of the drainage; also, the regulation of the street traffic, and generally of the buildings of the metropolis.

BOCKLAND (Sax. for bookland). An inheritance or possession held by the evidence of written instruments. It was one of the titles by which the English Saxons held their lands, and, being always in writing, was hence called bockland, which signifies *terram codicillariam*, or *librariam*, deed land or charter land. It was the same as *allodium*, being descendible according to the common course of nature and nations, and devisable by will. This species of inheritance was usually possessed by the thanes or nobles. Spelman on Feuds.

BONA NOTABILIA. Such goods as a party dying had in another diocese than that wherein he died, and as amounted at the least to £5, which, whoever had, must have had his will proved before the archbishop of that province, unless, by composition or custom, other dioceses were authorized to do it, where *bona notabilia* were rated at a greater sum. If, however, a person happened to die in another diocese than that wherein he lived, while on a journey, what he had about him of the value of £5 was not *bona notabilia*. Book of Canons, l Jac. Can. 92, 93; Cunningham. But now under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 3-4, the distinction of goods as *bona notabilia* has been abolished. 1 Wms. Exors. 279-280.

BONA VACANTIA. Goods in which no one claims a property but the king; such as royal fish, shipwrecks, treasure trove, waifs, strays, &c. Where a person dies possessed of personal property, intestate, and leaving no next of kin, the Crown becomes entitled upon office found to all such property. This title of the Crown is in virtue of its prerogative, and in this respect differs from the

BONA VACANTIA—continued.

title of the Crown to land by escheat. See *Middleton v. Spicer*, 1 Bro. C. C. 201; *Burgess v. Wheate*, 1 Eden, 177.

BOND. Is a contract by specialty to pay a certain sum of money. It is either single, i.e., simple, in which case the money is absolutely to be paid; or double, i.e., conditional, in which case the money is only conditionally payable, and ceases to be payable or becomes absolutely payable according to the event which is expressed in the condition. If the condition is entire and unlawful, the bond is void (*Collins v. Blantern*, 1 Sm. L. C. 325); but if the condition is severable, and part of it is good, the bond is valid to that extent (*Yale v. Rez* (in error), 6 Bro. P. C. 61). In the case of alternative conditions, if one becomes impossible, the other, as a general rule, becomes absolute (*Da Costa v. Davis*, 1 B. & P. 242). The chief varieties of bonds are the following:—Bonds of Indemnity, Post Obit Bonds, Voluntary Bonds, Administration Bonds, Bail Bonds, Bottomry Bonds, Debentures, Guaranties, Replevin Bonds, Bonds in Restraint of Trade, Resignation Bonds, and Lloyd's Bonds, most of which will be found explained under the appropriate titles.

See also title OBLIGATION.

BOROUGH: See title REPRESENTATION.

BOROUGH ENGLISH. The custom which prevails in certain ancient boroughs and copyhold manors, of lands descending to the youngest son instead of to the eldest. The reason of this custom seems to be, that in these boroughs people chiefly maintain and support themselves by trade and industry; and the elder children, being provided for out of their father's goods, and introduced into his trade in his lifetime, were able to subsist of themselves without any land provision, and therefore the land descended to the youngest son, he being in most danger of being left destitute. It is called borough English, because, as some hold, it first prevailed in England. Unlike Gavelkind, the mode of descent in borough English is confined to lineal descendants, and does not extend to collaterals.

See titles GAVELKIND; TENURES.

BOTTOMRY. Is in the nature of a mortgage of a ship, when the owner takes up money upon it to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*), as a security for the repayment thereof. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it return in safety, then he shall receive back his principal, and also

BOTTOMRY—continued.

the premium or interest agreed upon, however it may exceed what was once the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender; and in this case, the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for money lent. Park on Insurance.

See also titles RESPONDENTIA; SHIPPING.

BOUGHT AND SOLD NOTES. These are the notes which a broker of stock or goods sends respectively to the vendor and purchaser for whom he has been engaged in the particular sale. They furnish the evidence of the contract, and, if they agree, bind the principals, the broker having authority to sign for both. *Fisenden v. Levy*, 3 F. & F. 477.

BOUNDARIES. The boundaries of boroughs are at present regulated by the stats. 2 & 3 Will. 4, c. 64, and 6 & 7 Will. 4, c. 103. Upon a question of boundaries, evidence of reputation, although in the nature of hearsay, is receivable.

See title HEARSAY EVIDENCE.

BOURSE DE COMMERCE. In French law, is an aggregation sanctioned by Government of merchants, captains of vessels, exchange-agents, and courtiers, the two latter being nominated by the Government in each city which has a *bourse*.

BRAWLING. Under the 27 Geo. 3, c. 44, any suit for this offence was to be brought in the Ecclesiastical Court within eight months; but under the stat. 23 & 24 Vict. c. 32, the Ecclesiastical Courts were deprived of all their jurisdiction in the matter in the case of lay persons, and the justices of the peace were invested with authority to punish the offence as a misdemeanour.

BREACH OF PRIVILEGE. A breach of privilege is a contempt of the High Court of Parliament, whether relating to the House of Lords or to the House of Commons. Both branches of the Legislature act on the same grounds, both declare what are and what are not breaches of their privileges, when the question is raised, and both punish, by commitment or otherwise, as the Courts of Law and Equity do for contempt of Court. Resistance to the officers of the Houses of Parliament has, in almost all cases, been treated as a breach of the privileges of Parliament. The presence of strangers is a breach of privilege, though permitted on

BREACH OF PRIVILEGE—*continued.*

suffrance; and, formerly, to take a note of any of the proceedings was a high act of contempt, although now the representatives of the newspaper press are not only allowed to be present for that purpose, but have a gallery to themselves in each House, and every accommodation afforded them which the courtesy of the chief officers of both can render.

See title PRIVILEGES OF PARLIAMENT.

BREACH OF PROMISE OF MARRIAGE.

Under the stat. 14 & 15 Vict. c. 99, rendering the parties to a civil action competent to give evidence, the parties to a breach of promise case were expressly left to remain incompetent; but under the stat. 32 & 33 Vict. c. 68, that incompetency has been removed.

In Sch. B. to O. L. P. Act, 1852, the following simple form of count is given:—

That the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff. (No. 19.)

It is a defence to an action of this sort, that the defendant has since his promise discovered the plaintiff to be unchaste (*Irving v. Greenwood*, 1 O. & P. 350), or to have had a bastard by some one (*Young v. Murphy*, 3 Bing. N. C. 54), although ten or more years ago.

BRIBERY. The crime of offering any undue reward or remuneration to any public officer of the Crown, or other person entrusted with a public duty, with a view to influence his behaviour in the discharge of his duty. The taking such reward is as much bribery as the offering it. It also sometimes signifies the taking or giving a reward for public office. The offence is not confined, as some have supposed, to judicial officers. *Bribery* at elections vitiates the same. *See* stat. 31 & 32 Vict. c. 125 (Parliamentary Elections Act, 1868).

BROKERS. These are agents of various kinds, but principally agents on the Stock Exchange. By the stat. 6 Anne, c. 16, a broker on the Stock Exchange is required to be admitted by the Court of the Lord Mayor and Aldermen, and to pay 40s. yearly for the use of the City, under a penalty of £25, increased by the stat. 57 Geo. 3, c. 1x. (local and personal) to £100. But under the stat. 33 & 34 Vict. c. 60 (London Brokers Relief Act, 1870), the jurisdiction of the Court of Aldermen over brokers has been made to cease, saving existing rights; and brokers guilty of a fraud are disqualified from acting as brokers. It is the duty of a broker of the

BROKERS—*continued.*

City of London to charge his principal only with the cost price of articles purchased by him, in addition to his commission. *Procter v. Brain*, 2 M. & P. 284.

See also titles **JOBBER**; **FACTOR**.

BROTHER. The statutes for the repression or regulation of houses of this character are 25 Geo. 2. c. 36, 28 Geo. 3. c. 19, and 58 Geo. 3. c. 70. Any inhabitant of the parish may give information thereof to the parish constable, and the overseers of the parish are to pay to the informant upon conviction a reward of £10.

BUGGERY: *See* title **SODOMY**.

BUILDING SOCIETY. A benefit building society is constituted upon its adoption of the rules prescribed by the stat. 6 & 7 Will. 4, c. 32, and 12 & 13 Vict. c. 106, and which rules must be certified. It is within the jurisdiction of the Court of Chancery under the Companies Act, 1862, as to winding up (*In re Midland Counties Benefit Building Society*, 13 W. R. 399); but not within the provisions of the Acts regulating friendly societies or industrial and provident societies (25 & 26 Vict. c. 87).

BURGAGE TENURE. Tenure in burgage is described by Glanvil, and is expressly laid down by Littleton, to be but tenure in socage; and it is where the king or other person is lord of an ancient borough in which the tenements are held by a rent certain. It is, indeed, only a kind of town socage, by which other lands are holden, and is usually of a rural nature. A borough is usually distinguished from other towns by the right of sending members to Parliament; and where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. It is, therefore, a tenure proper to boroughs, whereby the inhabitants, by ancient custom, hold their lands or tenements of the king or other lord of the borough at a certain yearly rent. 3 Bl. 82.

See also title **TENURES**.

BURGLARY. A criminal offence which consists in entering a dwelling-house with intent to commit any felony therein, or being in such dwelling-house committing any felony therein, and in either case breaking out of the same dwelling-house, in the night, i.e., between the hours of 9 P.M. and 6 A.M. (24 & 25 Vict. c. 96, ss. 1, 51). The punishment is penal servitude for life, or for any term not less than five years, or imprisonment with or without hard labour, or with or without solitary confinement, for any term not exceeding two years.

BURIALS. Burial in the parish churchyard is a Common Law right inherent in the parishioners, only the mode of burial being of ecclesiastical cognisance; and under the stat. 4 Geo. 4, c. 52, the remains of persons against whom a finding of *felo de se* is had, are to be privately interred in the churchyard of the parish, but no Christian rites of burial are to be performed over them. All burials require to be registered, 27 & 28 Vict. c. 97, extending the Act 6 & 7 Will. 4, c. 86. Under the stat. 20 & 21 Vict. c. 81, provision is made for the constitution of a burial board in every parish; and where two parishes, each maintaining its own poor, are united together for ecclesiastical purposes, a burial board for the whole district appointed by the vote of the vestry, or meeting in the nature of a vestry, is properly constituted (18 & 19 Vict. c. 118). No burial fee is due at Common Law, but it may be due by custom (*Andrews v. Cawthorn*, Willes, 536), or (as is the usual case) in virtue of particular statutes.

See also title BIRTHS.

BYE-LAWS. Private laws or statutes made for the government of any corporation, which are binding upon themselves, unless contrary to the laws of the land, in which latter case they are void. By the stat. 5 & 6 Will. 4, c. 76, s. 1, all laws, statutes, and usages inconsistent with that Act are thereby annulled and repealed in regard to municipal corporations.

C.

CALLING THE PLAINTIFF. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself, whereupon the crier is ordered to call the plaintiff; and if neither he nor any body for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant recovers his costs. The phrase is synonymous with nonsuiting the plaintiff. See the phrase used in Car. & P. 351; 1 Car. & Marsh. 363.

See also title NON-SUIT.

CALLS: See title COMPANIES.

CAMPBELL'S (LORD) ACT. Under this Act (9 & 10 Vict. c. 93), and the Act amending same (27 & 28 Vict. c. 95), provision is made for compensating the families of persons killed by accident. For the purposes of these Acts the death must have resulted from the act, neglect, or default of the defendant or his servants, such act, neglect, or default being of a kind which,

CAMPBELL'S (LORD) ACT—continued.

if death had not ensued, would at Common Law have entitled the injured person to recover damages in respect thereof. The action is for the benefit of the wife, husband, parent, or child of the deceased person, and may be instituted by his or her executor or administrator; but in case the executor or administrator does not, within six months of the death, institute the necessary action, then any of the persons beneficially interested, whether legally, or even morally only, in the result of the action, may institute the same. Under the 31 & 32 Vict. c. 119, s. 5, the Board of Trade may appoint an arbitrator in the matter. The damages recoverable are strictly compensatory, and nothing is recoverable as a solatium.

CANALS. Are in general the property of companies, and the shares in them are pure personality (*Edwards v. Hall*, 6 De G. M. & G. 74). By the stat. 8 & 9 Vict. c. 42, canal companies were enabled to become carriers on their canals, or to lease the same, or to take leases of other canals; and by the subsequent Act, 17 & 18 Vict. c. 31, the traffic and tolls over canals were regulated. It seems that, subject to the payment of tolls and the rules as to traffic, the public have a right of using the canal (*Case v. Midland Ry. Co.* 5 Jur. (N.S.) 1017); and that a canal company cannot grant an exclusive right to let boats for hire over their water, so as to give the grantee a right to sue a third party for the infringement of his right. *Hill v. Tupper*, 9 Jur. (N.S.) 725.

CANCELLATION. This means the rescission of any contract or instrument, whether negotiable or not. There can be no cancellation of course without the intention of doing so (*De Bernardy v. Harding*, 8 Exch. 822). Bonds and deeds are cancelled by tearing off the seals; but this cancellation does not extend to divesting any estate or interest which has already vested under the deed. *Ward v. Lumley*, 29 L. J. (Ex.) 322.

CANON LAW. Is a body of Roman Ecclesiastical Law compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the Holy See. It was first digested in 1151 by Gratian into the *Decretum Gratiani*, or *Concordia Discordantium Canonum*; subsequently added to and continued by, or at the request of, Gregory IX. in 1230, in the *Decretalia Gregorii Noni*; subsequently still further added to by Boniface VIII., in 1298, in the *Sextus Decretalium*; afterwards by Clement V., in 1317, in the *Clementine Constitutions*; and completed by John XXII.

CANON LAW—*continued.*

in the *Extravagantes*, i.e., Riders. In addition to the Canon Law properly so called, there exists also a large compilation of Legatine and Provincial Constitutions, which are roughly considered as forming part of the Canon Law.

Upon the Reformation of Religion in England in the reign of Henry VIII., the authority of the Pope having been destroyed, all those canons which derived their force from that authority, of necessity ceased to have any force or efficacy; but by the stat. 25 Henry 8, c. 19, which was afterwards confirmed by the stat. 1 Eliz. c. 1, such of the then existing canons as were not repugnant to law or morality, or to the King's prerogative, were to continue in force until new canons were devised, which has never yet been done.

Upon the construction of this statute it has been decided in *Cawdrey's Case* (5 Rep. 1, 33 Eliz.), that not only the clergy but also the laity were bound by the then existing canons; and in *Middleton v. Croft* (2 Atk. 669), that the Canons of 1603 (and generally all canons subsequently made), never having been confirmed in Parliament, do not *proprio vigore* bind the laity, but the clergy only.

CANONS OF DESCENT: See title DE SCENTS.

CAPIAS. Under the Imprisonment for Debt Act, 1869, there cannot be any writ of *capias* on bailable process. But before that Act, and under the 1 & 2 Vict. c. 110, the writ of *capias* might have issued after commencement of an action (although not as a means of commencing it), by leave of the judge, in cases where the cause of action amounted to £20, and the defendant was threatening to quit England.

See also following titles.

CAPIAS AD AUDIENDUM JUDICIUM.

In case a defendant be found guilty of a misdemeanour (the trial of which may, and usually does, happen in his absence), a writ so called is awarded and issued to bring him to receive his judgment.

CAPIAS AD SATISFACIENDUM (in practice frequently called shortly a *Ca. Sa.*). A writ of execution which a plaintiff takes out after having recovered judgment against the defendant; it is directed to the sheriff, and commands him to take the defendant and safely keep him, in order that he may have his body at Westminster on a day mentioned in the writ to make the plaintiff satisfaction for his demand.

See also title EXECUTION.

CAPIAS IN WITHERNAM. A writ which lies where a distress taken is driven out of the county, so that the sheriff can-

CAPIAS IN WITHERNAM—*continued.*

not make deliverance in replevin, commanding the sheriff to take as many beasts of the distrainer, &c.

See also titles RETORNO HABENDO; WRIT DE REPLEVIN; and ELOIGNMENT.

CAPIAS UTLAGATUM: See title OUTLAWRY.

CAPITA (DISTRIBUTION PER). In the distribution of the personal estate of a person dying intestate, the claimants, or the persons who, by law, are entitled to such personal estate, are said to take *per capita* when they claim in their own rights as in equal degree of kindred, in contradistinction to claiming by right of representation, or *per stirpes*, as it is termed. As if the next of kin be the intestate's three brothers, A., B., and C., here his effects are divided into three equal portions and distributed *per capita*, one to each; but if A. (one of these brothers) had been dead and had left three children, and B. (another of these brothers) had been dead and had left two; then the distribution would have been by representation, or *per stirpes*, as it is termed, and one-third of the property would have gone to A.'s three children, another third to B.'s two children, and the remaining third to C., the surviving brother.

CAPITAL. The punishment of death is frequently termed capital punishment; and those offences are called capital offences for which death is the penalty allotted by law. The use of the term may probably have arisen from the decapitation which, in former times was a common mode of executing the sentence of death, and which is prescribed in some of the statutes against traitors even now remaining in force. The extreme sentence of the law, however, has for many years been carried into effect against all offenders by hanging them by the neck. The offences which are still capital offences have, by the humane spirit of modern legislation, been recently much diminished, and latterly only included high treason, murder, rape, and unnatural offences, setting fire to any king's ship or stores, the causing injury to life with intent to commit murder, burglary accompanied with an attempt at murder, robbery accompanied with stabbing or wounding, setting fire to a dwelling-house any person being therein, setting fire to or otherwise destroying ships with intent to murder any person, exhibiting false lights with intent to bring ships into danger, piracy accompanied by stabbing, and riotous destruction of buildings. Stew. Bl. 128, n. (k). But at the present day, the only capital offences punishable with death are treason and murder, all other offences formerly capital being now

CAPITAL—continued.

punishable with penal servitude for life or years, or some term of imprisonment.

CAPTION (*captio*). This word has several significations. When used with reference to an indictment, it signifies the style or preamble or commencement of the indictment; when used with reference to a commission it signifies the certificate to which the commissioners' names are subscribed, declaring when and where it was executed. The act of arresting a man is also termed a caption. Burn's Just. tit. Indictment; Cunningham.

CAPUT BARONIE. The castle or chief seat of a nobleman, which, if there be no son, must not be divided amongst the daughters as in the case of lands, but descends to the eldest daughter. Cowel.

CARNALLY KNOWING: See titles ABDUCTION; BUGGERY; RAPE; SODOMY.

CARRIER. A common carrier is one who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him (*Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749). Such is a proprietor of waggons, barges, lighters, merchant ships, or other instruments for the public conveyance of goods (1 Smith's L. C. in notes to *Coggs v. Bernard*, 101). A person who conveys passengers only is not a common carrier (*Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79). The liability of carriers is limited by 11 Geo. 4 & 1 Will. 4, c. 68, provided they have put up notices as required by the Act, and such notices have come to the knowledge of their customer. *Kerr v. Willan*, 6 M. & S. 150.

See also title BAILMENT.

CARRYING COSTS. A verdict is said to carry costs when the party for whom the verdict is given becomes entitled to the payment of his costs as incident to such verdict. Where the damages given by a verdict are under forty shillings, the party obtaining such verdict is usually not entitled to his costs, and such a verdict is therefore said not to carry costs; but the judge may certify for costs.

CARTA DE FORESTA. A charter of the forest (confirmed in Parliament, 9 Hen. 3), by which many forests unlawfully made, or at least any precincts added by unlawful encroachments, were disafforested. 3 Hallam's Mid. Ag. 222; Reeves, 254.

CASE, SPECIAL. See title SPECIAL CASE.

CASH NOTE. Is simply a bank-note of a provincial bank or of the Bank of England. It is considered as cash for all purposes, a Bank of England note being, since

CASH NOTE—continued.

3 & 4 Will. 4, c. 98, s. 6, a legal tender even for all sums above £5, excepting of course at the Bank of England itself or its branch banks.

CASSETUR BREVE. A judgment is so termed because it commands the plaintiff's writ to be quashed. An entry of a *cassetur breve* is usually made by the plaintiff in an action after the defendant has pleaded a plea in abatement which the plaintiff is unable to answer, and therefore wishes his informal writ to be quashed, in order that he may sue out a better. See Tidd's Forms; 3 Chit. Plead. 1063, 6th ed.

CASU CONSIMILL. A writ of entry granted where a tenant by the courtesy or tenant for life aliens, in fee or in tail, or for another's life. It is brought by the person entitled to the reversion against the party to whom such tenant has so aliened to his prejudice. It derives its name from the circumstance of the clerks in Chancery having by common consent framed it after the likeness of a writ termed *casu proviso*, in pursuance of the authority given them by the statute, 13 Edw. 1, and which also empowers them to frame new forms of writs (as much like the former as possible) whenever any new case arises in Chancery resembling a previous one, yet not adapted to any of the writs then in existence. *Les Termes de la Ley*.

CASUAL EJECTOR. The nominal defendant, Richard Roe, in an action of ejectment is so called, because by a legal fiction he is supposed casually, or by accident, to come upon the land or premises and turn out the lawful possessors. See also title EJECTMENT.

CATTLE. Selling diseased cattle is a misdemeanour, if they are intended to be forthwith slaughtered for meat; and selling diseased cattle to a cattle-rearer, with knowledge of the contagious character of the disease is a tort, for which the purchaser may recover full damages from the vendor (*Mullet v. Mason*, 1. R. 1 C. P. 559). There are also the following Acts regulating the treatment of cattle afflicted with contagious diseases:—29 & 30 Vict. cc. 2, 5, 15; 30 & 31 Vict. cc. 35, 125; 32 & 33 Vict. c. 70.

CAUTIONE ADMITTENDA. A writ which lies against a bishop for holding an excommunicated person in prison for his contempt, notwithstanding his having offered sufficient pledges to obey the orders of the holy church for the future. Cowel.

CAUTIONNEMENT. In French law is the becoming *surety* in English law.

See title SURETYSHIP.

CAVEAT. A process formerly used in the Spiritual Court and now used in the Court of Probate, to prevent or stay the proving of a will, or the granting of administration. When a caveat is entered against proving a will, or granting administration, a suit usually follows to determine either the validity of the testament, or who has a right to administer. This claim or obstruction by the adverse party is an injury to the party entitled, and as such is remedied by the sentence of the Court of Probate either by establishing the will or granting the administration. A *caveat* may also be lodged in the Court of Chancery against inrolling a decree which it is intended to appeal to the Lords Justices in Full Court, inasmuch as after inrolment the only appeal is to the House of Lords. But since the Judicature Act, 1873, this distinction is probably of less importance.

CAVEAT EMPTOR (*let the buyer beware*). A maxim of law applicable to the sale of goods and chattels, under or according to which a vendor is not bound to answer for the goodness of the wares he sells, unless he expressly warrants them to be sound and good, or unless he knows them to be otherwise, and uses any art to disguise them; and this is so, although the price is such as is usually given for a sound commodity. Every affirmation, however, at the time of sale, is a *warranty*, if it appears to have been so intended.

CEMETERIES: See BURIALS.

CENTRAL CRIMINAL COURT. This Court was constituted by the Acts 4 & 5 Will. 4, c. 36, and 19 & 20 Vict. c. 16, for the trial of offences committed in the Metropolis and certain parts of Essex, Kent, and Sussex adjoining thereto, and of such other offences as the Court of Queen's Bench in term, or a judge thereof in vacation, may direct to be removed thither, although committed out of the proper jurisdiction of the Court.

CEPI CORPUS. When a writ of *capias* was directed to the sheriff to execute it, he was commanded to return it within a certain time, together with the manner in which he had executed it. If the sheriff had taken the defendant, and had him in custody, he returned the writ, together with an indorsement on the back stating that he had taken him, which was technically called a return of *Cepi Corpus*.

CERTAINTY, IN PLEADING. The word is used in pleading in the two different senses of distinctness and particularity. When, in pleading, it is said that the issue must be certain, it means that it must be particular or specific, as opposed to undue

CERTAINTY, IN PLEADING—cont.

generality. Steph. Pl. 143, 4th ed. See also *Rez v. Horne*, Cowp. 682.

CERTIFICATE, TRIAL BY. This is a mode of trial now little in use; it is resorted to in cases where the fact in issue lies out of the cognizance of the Court, and the judges, in order to determine the question, are obliged to rely upon the solemn averment or information of persons in such a station as affords them the clearest and most competent knowledge of the truth. Thus, when a custom of the City of London is in issue, such custom is tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder; so, in the action of dower, when the tenant pleads in bar that the demandant was never *accoupled* to her alleged husband in *lawful matrimony*, and issue is joined upon this, the Court awarded that it should be tried by the diocesan of the place where the parish church in which the marriage was alleged to have been had was situated, and that the result should be certified to them by the ordinary at a given day. Steph. Pl. 112, 113; Co. Litt. 74.

CERTIORARI. An original writ, issuing sometimes out of the Court of King's Bench, and sometimes out of Chancery. It is usually resorted to shortly before the trial, to certify and remove any matter or cause, with all the proceedings thereon, from some inferior Court into the Court of King's Bench, when it is surmised that a partial or insufficient trial will probably be had in the Court below (4 Vin. Abr. 329). It lies either for the verification of errors, or for the removal of complaints in replevin, or (most generally) for the removal of criminal proceedings.

CESSAT EXECUTIO. The suspending or stopping of execution. If in an action of trespass against two persons, judgment be given against one, and the plaintiff takes out execution against him, the writ will abate as to the other, because there must be *cessat executio* until it is tried against the other defendant. Toml.

CESSAVIT. A writ that formerly lay in various cases. It was generally sued out against a person for having neglected for two years to perform such service, or to pay such rent, as he was bound to by his tenure, and at the same time had not upon his premises sufficient goods or cattle to be distrained (Cowel). It also lay where a religious house had lands given to it on condition of performing some certain spiritual service, as reading prayers, giving alms, and which service it had neglected; and in either of the above cases if the *cesser* or neglect had continued for two years, the

CESSAVIT—*continued.*

lord or donor and his heirs had a writ of *cessavit* to recover the land itself, *eo quod tenens in facienlis servitiis per biennium jam cessavit*. Somewhat similar to the effect of this writ is the provision in the modern Acts regulating gifts of lands for popular education and amusement, that when the same lands cease to be so used they shall revert to the donor; in order to decide the fact of the cesser of their appointed use; a writ of summons in *cessavit*, or something analogous thereto, would, presumably, have to issue.

CESSION. Ceding or yielding up. By stat. 21 Hen. 8, c. 73, if any one having a benefice of £8 per annum or upwards, according to the then present valuation in the king's books, except any other, the first shall be adjudged void unless he obtains a dispensation, which no one is entitled to have but the chaplains of the king and others therein mentioned, the brethren and sons of lords and knights, the doctors and bachelors of divinity and law admitted by the universities of this realm; and a vacancy thus made, for want of a dispensation is called a *cession*.

CESSION DES BIENS. This in French Law is the surrender which a debtor makes of all his goods to his creditors, when he finds himself in insolvent circumstances. It is of two kinds, either voluntary or compulsory (*judiciaire*) corresponding very nearly to liquidation by arrangement and bankruptcy in English Law.

CESTUI QUE TRUST. He for whose use or benefit another is invested or seised of lands or tenements; or in other words, he who is the real, substantial, and beneficial owner of lands which are held in trust.

See title TRUSTS.

CESTUI QUE USE. He for whose use lands or tenements are held by another.

See title USES.

CESTUI QUE VIE. He for whose life lands or tenements are granted. Thus, if A. grants lands to B. during the life of C., here C. is termed the *cestui que vie*.

CHAIRMAN OF COMMITTEES OF THE WHOLE HOUSE. At the commencement of every new Parliament, each of the two Houses respectively selects from its own body a member to preside over its proceedings whilst the House is in committee. The officer so appointed is called "The Chairman of Committees of the whole House," and exercises the same authority in a committee of the whole House as does the Speaker on ordinary occasions. May's Parl. Pr.

CHALLENGE. An exception taken either against persons or against things,—(1.) Against persons, as jurors, either one or more of them; (2.) Against things, as a declaration, &c. There are two kinds of challenge of jurors—either (1.) to the *array*, by which is meant the whole jury as it stands arraigned in the panel (see title PANEL); or (2.) to the *polls*, by which is meant one or more of the several particular persons or heads in the array. A challenge to the array is at once an exception to the whole panel in which the jury are arrayed; and it may be made upon account of partiality, or some default in the sheriff or his under officer, who arrayed the panel; as where the panel was arrayed at the nomination or under the direction of either the plaintiff or defendant in the cause, &c., this would be a good ground for a challenge to the array. Challenges to the polls are exceptions to particular jurors; and seem to answer to the *recusatio judicis* in the Civil and Canon Laws. Challenges to the polls of the jury (who are judges of fact) are by Sir Edward Coke reduced to four heads, viz., *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*. See also Smith's Action at Law, 145, 10th ed.

CHALLENGE TO FIGHT. Is an indictable offence, punishable with fine or imprisonment, or both. It has been decided that no words of provocation however aggravating can justify it. *R. v. Rice*, 3 East, 581.

CHAMBERS. Both at Common Law and in Chancery a very large amount of business is transacted in Chambers by the judges, and their subordinate officers, whether masters (as they are called at Common Law), or chief clerks (as they are called in Chancery). The jurisdiction of the masters at chambers is defined by the 30 & 31 Vict. c. 68, and the rules made in pursuance thereof, as follows:—All such business as by virtue of any statute or custom, or by the rules or practice of the Courts, or any of them respectively, were at the time of the passing of the said Act, or now are, done, transacted, or exercised by any judge of the said Courts sitting at chambers, except in respect of matters relating to the liberty of the subject, and except (unless by consent of the parties), in respect of the following proceedings and matters, that is to say,—

- (1.) All matters relating to criminal proceedings;
- (2.) The removal of causes from the inferior Courts, other than the removal of judgments for the purpose of execution;
- (3.) Prohibitions and injunctions;

CHAMBERS—continued.

- (4.) References under C. L. P. Act, 1854;
- (5.) Rectifying of companies' registers;
- (6.) Interpleader, not being matters of practice only;
- (7.) Discovery;
- (8.) Reviewing taxation of costs;
- (9.) Staying proceedings after verdict;
- (10.) Acknowledgments of married women;
- (11.) Leave to sue *in forma pauperis*; and
- (12.) Orders charging stock, funds, annuities, dividends, or annual produce thereof.

The jurisdiction of the chief clerks at chambers, as defined by the Master in Chancery Abolition Act (15 & 16 Vict. c. 80), comprises the following several matters:—

- (1.) Appointment of guardians to infants;
- (2.) Maintenance and advancement of infants;
- (8.) Administration of personal estates of deceased persons;
- (4.) Proceedings under Legacy Duty Act;
- (5.) Applications for time to *plead*, *answer*, or *demur*;
- (6.) Applications for leave to *amend* bills;
- (7.) Applications to *enlarge time* for closing evidence;
- (8.) Applications for *production* of documents;
- (9.) Applications regarding *conduct* of suit; and
- (10.) Applications regarding management of property.

And the same jurisdiction has been extended by the 18 & 19 Vict. c. 134, and General Order xxxvi. to the following further matters, viz.:—

- (11.) Applications for payment of dividends on funds in Court;
- (12.) Applications under } when fund
- Legacy Duty Act; } does not
- (13.) Applications under } exceed
- Trustee Relief Acts; } £300;
- (14.) Applications for vesting order under Trustee Acts;

and the same jurisdiction has been by further Acts and Orders extended to the following further matters:—

- (15.) Special orders for taxation or review of taxation;
- (16.) Applications for new trustees of charities;
- (17.) Applications under Mortgage Debenture, Act, 1865;
- (18.) Applications in arbitrations under C. L. P. Act, 1854; and
- (19.) Transfer of causes from County

CHAMBERS—continued.

Court to High Court of Chancery, and *vice versa*.
And generally, all decrees and inquiries are prosecuted in Chambers.

CHAMPARTY, or CHAMPERTY. This species of maintenance consists in the purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation (2 Inst. 484, 562, 563; *Stanley v. Jones*, 7 Bing. 878; *Stevens v. Bagwell*, 15 Ves. jun. 139). It is not champerty if the parties have a common interest, and a moral interest, as that of a parent in a child, suffices: nor is it champerty to simply mortgage the property in litigation with a view to raising the requisite funds. *Cockell v. Taylor*, 15 Beav. 103.

CHANCEL: See title CHURCH.

CHANCELLOR. There are many officers bearing this title; those, however, which it will be necessary to mention here, are: 1st. The Lord Chancellor. 2ndly, the Chancellor of the Duchy of Lancaster. 3dly, the Chancellor of a Diocese; and 4thly, the Chancellor of the Exchequer. (1.) The Lord Chancellor is the presiding judge in the Court of Chancery; he is created by the mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedence to every temporal lord. He is a privy councillor by his office, and prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else was then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience, visitor in right of the king of all hospitals and colleges of the king's foundation, and patron of all the king's livings under the value of twenty marks per annum, in the king's books. He is the general guardian of all infants, idiots, and lunatics: and has the general superintendence of all charitable uses in the kingdom. And all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery. (2.) The Chancellor of the Duchy of Lancaster is the Chief Judge of the Duchy Court, who in difficult points of law used to be assisted by two judges of the Common Law, to decide the matter in question. This Court used to be held in Westminster Hall, and was, formerly, much used in relation to suits

CHANCELLOR—*continued.*

between tenants of Duchy lands, and against accountants and others for the rents and profits of the said lands. It is now held in Manchester and Liverpool, the chief cities of the Duchy, and is presided over by a Vice-Chancellor, who decides all judicial questions. (3.) The Chancellor of the diocese, or of a bishop, is an officer appointed to hold the bishop's Courts for him, and to assist him in matters of Ecclesiastical Law; who as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some University. (4.) The Chancellor of the Exchequer, is also a high officer of the Crown, who used to sit sometimes in Court, and sometimes in the Exchequer Chamber; and, together with the regular judges of the Court, saw that things were conducted to the king's benefit. His principal duties, however, are not of a judicial character, but concern the management of the royal revenue; and under the Judicature Act, 1873, he is deprived altogether of his strictly judicial functions.

CHANCE-MEDLEY. The accidentally killing a man in self-defence is so termed; as if, in the course of a sudden broil or quarrel, I, in the endeavour to defend myself from the person who assaults me, accidentally kill him.

CHANCERY. The High Court of Chancery is the highest Court of judicature in this kingdom next to the Parliament, and is of a very ancient institution. The jurisdiction of this Court is of two kinds: (1.) ordinary, and (2.) extraordinary. (1.) The ordinary jurisdiction is that wherein the Lord Chancellor, Lord Keeper, &c., in his proceedings and judgments, is bound to observe the order and method of the Common Law; and (2.) the extraordinary jurisdiction is that which the Court exercises in cases of equity, *i.e.*, "of grace."

The ordinary Court holds plea of recognizances acknowledged in the Chancery, writs of *scire facias* for repeal of letters patent, &c., and also of all personal actions by or against any officer of the Court; and by Acts of Parliament, of several other offences and causes. All original writs, commissions of bankruptcy, of charitable uses, and other commissions, as *idiota*, *lunacy*, &c., issue or used to issue out of this Court, for which purposes the Chancery was said to be always open; and sometimes a *supersedeas* or writ of privilege hath been here granted to discharge a person out of prison. An *habeas corpus*, prohibition, &c., may be had from this Court in the vacation, and here a *subpoena* may be had to force witnesses to appear in other Courts, where these latter Courts have

CHANCERY—*continued.*

no power to call them. 4 Inst. 79; 1 Danv. Abr. 776.

The extraordinary Court, or Court of Equity, proceeds by the rules of equity and conscience, and moderates the rigour of the Common Law, considering the intention rather than the words of the law, Equity being the correction of that wherein the Law, by reason of its universalities, is deficient. On this ground therefore, to maintain a suit in Chancery, it is ordinarily alleged that the plaintiff is incapable of obtaining relief at Common Law; and this must be without any fault of his own, as by having lost his bond, &c., Chancery never acting against but in assistance of the Common Law, supplying its deficiencies, not contradicting its rules. Under the Judicature Act, 1873, the Court of Chancery is to be known as the Chancery Division of the High Court of Justice, and is to retain all its extraordinary jurisdiction as above defined (sect. 34), but apparently no part of its ordinary jurisdiction, which is transferred, part of it (*e.g.*, *Idiocy*, *Lunacy*, *Patents*, &c.) to the Court of Appeal, and the other part of it to the other divisions of the High Court of Justice, which represent respectively the Courts at present respectively known as the Courts of Common Law.

CHAPELEY (*capellania*). The same thing to a chapel as a parish is to a church, *i.e.*, the precincts and limits of it. *Les Termes de la Ley*; Cowel; 6 Jur. 608.

CHAPTER. An assembly of clerks in a church cathedral; and in another signification, a place wherein the members of that community treat of their common affairs. It may be said that the collegiate company is termed chapter metaphorically, the word originally implying a little head; for this company or corporation is, as a head, not only to rule or govern the diocese in the vacation of the bishopric, but also in many things to advise the bishop, when the see is full. *Les Termes de la Ley*.

CHARACTER, EVIDENCE AS TO. In Anglo-Saxon times, this species of evidence, so far as it regarded the parties themselves to an action or suit, was almost the only evidence regarded (*see* title *COMPURATION*); but with the introduction of the Norman procedure by inquest or recognition, evidence of witnesses as to facts came to be received, and also to be principally attended to, and evidence as to the character of the parties gradually sank to the secondary position which it at present occupies. The law as it exists at the present day may be thus stated:—

(1.) As to parties,—Character evidence, as a general rule, is not receivable at all; excepting, of course, when the character of

CHARACTER, EVIDENCE AS TO—*cont.*

the party is directly in issue, and excepting in criminal prosecutions, when the character of the party has some bearing upon the offence with which he stands charged. Best on Evidence, pp. 355-357; and,

(2.) As to witnesses.—Character evidence, as a general rule, is always receivable, the evidence being, however, of a general character (as distinguished from particular circumstances), and going to affect the credibility of the witness only.

CHARGING ORDER. Under the stat. 1 & 2 Vict. c. 110, ss. 14-16, aided by the stat. 3 & 4 Vict. c. 82, s. 1, when a judgment debtor shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England, a judge at chambers may, on the *ex parte* application of the creditor, grant an order *nisi* charging the property in question with the judgment debt, the order becoming absolute unless the debtor take proceedings according to the statute to discharge it, but the realization of the security to be postponed for six months (*Brown v. Bamford*, 9 M. & W. 42). In case the order is erroneous, the Court may discharge it (*Fowler v. Churchill*, 11 M. & W. 57). In the case of a fund in the Court of Chancery, if the charging order is in aid of a judgment of a Common Law judge, then the latter judge, and not a judge of the Court of Chancery, is to make the order; but a Vice-Chancellor will grant a stop-order in such a case in aid of the charging order. On the other hand, if the charging order is sought in aid of a decree of the Court of Chancery itself, then, whether the fund is in Court or not, the Court will issue it, together with a stop-order, upon the petition of the creditor, who need not have entitled his petition in the Act 1 & 2 Vict. c. 110.

See title STOP-ORDER.

CHARGING PART OF A BILL IN CHANCERY. The plaintiff in a suit in Equity, after setting forth the subject of complaint, adds such circumstances by way of allegation as are calculated to corroborate his statement, or anticipate and controvert the claim of his adversary; and such allegations are technically called charges, and the part of the bill in which they occur is termed the charging part of the bill.

CHARITIES: See titles CHARITABLE TRUSTS ACTS; CHARITABLE USES; and MORTMAIN.

CHARITABLE TRUSTS ACTS. Under these Acts, being principally the Act of 1853 (16 & 17 Vict. c. 137), the Act of 1855 (18 & 19 Vict. c. 124), and the Act of 1860 (23 & 24 Vict. c. 136), the manage-

CHARITABLE TRUSTS ACTS—*contd.*

ment of the properties of charities has been regulated and facilitated. A board, entitled the Charity Commissioners, is constituted, having the entire control of the administration of the properties, and notice to whom must be given before any application is made to the Court of Chancery under the Acts touching the affairs of the charities. It seems that such an application may be made after such notice is given, although the Charity Commissioners refuse their sanction to the objects of the application, (*Watford Burial Board, Ex parte*, 2 Jur. (N.S.) 1045), but not, *quære*, if they disapprove of the application altogether. It must be remembered, however, that the Court of Chancery has an original jurisdiction in matters of charities, and that it is not ousted thereof by the statutes above-mentioned.

CHARITABLE USES. Those objects and purposes are considered charitable, firstly, which are expressly enumerated in the stat. 43 Eliz. c. 4; and, secondly, which by analogy are deemed within its spirit and intendment. The charitable objects enumerated by the stat. of Elizabeth are as follows: "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."

The classes of gifts which have been held to be within the spirit and intendment of the statute, although not expressly enumerated therein, are principally the following:—

Gifts for the advancement of religion, or connected with religious services or places, *e.g.*, bequests for the ornaments of a parish church, for the stipend of a minister or curate, or for the augmentation thereof, for the distribution of bibles, for keeping in repair the church chimes; also, in assistance of the poor, as of unsuccessful literary men; and generally all purposes which are of a public and legal nature. And since the Toleration Act (1 W. & M. c. 18), a gift of any of these sorts in favour of dissenters or nonconformists is equally legal, provided it be not for a purpose deemed *superstitious*, as to which see title SUPERSTITIOUS USES; and since the stat. 2 & 3 Will. 4, c. 115, Roman Catholics have been

CHARITABLE USES—*continued.*

put upon the same footing as Protestant Dissenters.

CHARTERPARTY. This is an agreement in writing (not necessarily nor even usually under seal), whereby a shipowner lets an entire ship, or part of a ship, to a merchant for the conveyance of goods, and the merchant in consideration thereof, and of the conveyance of the goods to be thereunder effected, promises to pay to the shipowner an agreed sum by way of freight for their carriage. A charterparty is in general effected through a broker acting for the shipowner. A ship chartered in this manner is opposed to a general ship.

Construction of Charterparty.—The agreement is construed liberally, upon the maxim *ut res magis valeat quam pereat*; but if the words are clear the Court will not reject or explain away a stipulation, however harsh or oppressive in the event (*Stadhard v. Lee*, 3 B. & S. 364). Also, usage is admissible to explain mercantile terms and phrases, but not to contradict or vary the written instrument itself. However, a custom not repugnant to anything in the writing may be annexed to it. And with reference to what mistakes shall avoid the contract and what stipulations amount to conditions precedent, and generally as to all other matters of construction, the rules applicable to other contracts apply to charterparties also.

Dissolution of Charterparty.—The agreement may be dissolved—

(1.) By consent before breach without any new consideration, and after breach upon terms. If the original agreement is by deed, the agreement for dissolution must be by deed also; on the other hand, if the original agreement is in writing not under seal, the agreement for dissolution may be either in like writing or by word of mouth, and that notwithstanding the original contract may require by statute to be in writing. *Taylor v. Hillary*, 1 Cr. M. & R. 741;

Also (2). By an unreasonable delay in the commencement of the voyage, at least when a particular day is fixed for the sailing, and time is (as it usually is) of the essence of the contract;

Also (3). By act of law, rendering the performance impossible, without any fault of the parties; e.g., by the outbreak of a war or a general interdiction of commerce, but not by a mere embargo, nor even by a blockade, although duly notified.

Remedies on Charterparty.—The remedy, if the contract is under seal, is by action of debt or covenant, but if in writing not under seal, by action of assumpsit. With reference to the parties to sue and be sued, the same rules apply as are applicable to

CHARTERPARTY—*continued.*

ordinary contracts, e.g., to charge the undiscovered principal without discharging the agent; and if the contract is under seal, the like rules apply.

CHASE. This word has two significations in the Common Law. First, it signifies a driving of cattle to or from any place, as to chase a distress to a castle or forelet. Secondly, it signifies a place for the reception of deer and wild beasts of the chase generally, as the buck, doe, fox, marten, and roe, &c. A chase is not the same as a forest, or a park, but is of a nature between the two, being commonly less than a forest and not having so many liberties and privileges incident to it, and yet of larger extent than a park, and stored with a greater diversity of game, and having more keepers to superintend it. And it is said by Crompton in his Jurisdiction, 148, that a forest is no sooner in the hands of a subject than it loses its name, and at once becomes a chase; so that a chase is distinguished from a forest on the one hand in this respect, that the latter cannot be in the hands of a subject, and the former may be so; and from a park, on the other hand, in this respect, that the chase is not enclosed, and has not only a larger compass and more game, but also a greater number of keepers and officers. *Manwood's Forest Laws*; 4 Inst. 314.

CHATELS. All things which are usually comprehended under the name of goods, come under the general name of chattels. Chattels are divided into two kinds, real and personal. Chattels real, are such as concern real estates, or landed property, and are so called because they are interests issuing out of such kind of property, as the next presentation to a church, terms for years, estates by statute merchant, statute staple, elegit, &c. Chattels personal are generally such as are moveable, and may be carried about the person of the owner wherever he pleases to go; such as money, jewels, garments, animals, household furniture, and almost every description of property of a moveable nature. Things personal, however, are not confined to moveables; for as things real comprise not only the land itself, but such incorporeal rights as issue out of it, so things personal include not only those tangible subjects of property which are capable of locomotion, but also the incorporeal rights or interests which may grow out of or be incident to them. This class (to which may be assigned the term of incorporeal chattels), comprehends among other species, patent right, or the exclusive privilege of selling and making particular

CHATTELS—*continued.*

contrivances of art; and copyright, or the exclusive privilege of selling and publishing particular works of literature.

CHAUD-MEDLEY. The killing of a man in an affray in the heat of blood, and while under the influence of passion; it is thus distinguished from chance medley, which is the killing a man in a casual affray in self-defence.

CHAUNTRY. A church or chapel endowed with lands or other yearly revenues for the maintenance of one or more priests to sing masses daily for the souls of the donors, and such others as they appointed. (*Les Termes de la Ley*). Such uses would at the present day be void as *superstitious*. (See title *SUPERSTITIOUS USES*). The chauntries were abolished by a statute passed in the last year of the reign of Henry VIII. and the first year of that of Edward VI.

CHEATING. Various forms of cheating are made criminal offences, chiefly the following:

- (1.) Obtaining goods, &c., by false pretences;
- (2.) Selling goods by false scales;
- (3.) Various offences enumerated in the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11.

The offence is a misdemeanour in each case.

CHEQUES: See title *BILL OF EXCHANGE*.

CHIEF (EXAMINATION OF WITNESS IN). Every witness who gives his testimony in a trial at *Nisi Prius*, is first examined by the counsel of the party on whose behalf he is called; and the first examination is termed his examination in chief. He is then subject to cross-examination by the counsel on the other side; which cross-examination may be in its turn succeeded by a re-examination by the counsel who originally called him (3 C. & P. 113). In the Court of Chancery the examination in chief has hitherto been taken by affidavit, but under the Judicature Act, 1873, the practice in Chancery is assimilated to that of the Common Law.

CHIEF RENTS. Those rents which are payable by the freeholders of manors, are frequently so called, and they are also denominated quit-rents, *i. e.*, *quieti redditus*, because thereby the tenant goes quit and free of all other services.

CHIEF, TENANT IN. All the land in the kingdom was supposed to be holden mediately or immediately of the king, who was styled the lord paramount or lord above all; and those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*

CHIEF, TENANT IN—*continued.*

or *in chief*, which was the most honourable species of tenure, but at the same time subjected the tenant to greater and more burdensome services than inferior tenures did.

See title *FEUDAL TENURES*.

CHILD. In law means a legitimate child in the absence of evidence of an intention to signify an illegitimate child.

See titles *INFANT*; *PARENT AND CHILD*; *ABDUCTION*; *ABANDONMENT*; *CONCEALMENT OF BIRTH*.

CHILD STEALING, OFFENCE OF. Under the stat. 24 & 25 Vict. c. 100, s. 56, any one who, whether by force or fraud, unlawfully leads, decoys, or entices away, or who detains any child under the age of fourteen years, with intent to deprive the lawful guardian of the possession of the child, or with intent to steal the articles upon it; and any one knowingly receiving or harbouring such a child, is guilty of felony, and is punishable with penal servitude from seven to five years, or to imprisonment for two years, with or without hard labour, and if a male under sixteen, with or without whipping.

CHILTERN HUNDREDS. The stewardship of the Chiltern Hundreds is a nominal office in the gift of the Crown, usually accepted by members of the House of Commons desirous of vacating their seats. "Her Majesty's Chiltern Hundreds" are three in number, namely, Stoke, Desborough, and Bonenharn, and are distinguished by the use made of them for parliamentary purposes. By law a member once duly elected is compellable to discharge the duties of the trust conferred upon him, and is not enabled at will to resign it. But by stat. 6 Anne, c. 7, and several subsequent statutes, if any member accepts of any office of profit from the Crown (excepting officers in the army or navy accepting a new commission), his seat is vacated. If, therefore, any member wishes to retire from the representation of the county or borough by which he was sent to Parliament, he applies to the Lords of the Treasury for the stewardship of one of the Chiltern Hundreds, which having received, and thereby accomplished his purpose, he again resigns the office. Rogers on Elections; 2 Hutsell, 41; May's Parl. Pr. 576-7.

CHIMIN. A way, which is of two kinds—(1.) The king's highway; and, (2.) A private way. (1.) The king's highway is that by which the king's subjects and all under his protection have free liberty to pass, although the property in the soil on each side, or even *in medium*

CHIMIN—continued.

filum viae, may belong to some private person. (2.) A private way is that by which one or more persons have a right or liberty to pass through another person's ground. Cowel.

See also title **WAY**.

CHIROGRAPH. An instrument of gift or conveyance attested by the subscription and crosses of the witnesses, and which was in the Saxon times called *Chirographum* and which being somewhat changed in form and manner by the Normans, was by them styled *charta*. Anciently, when they made a chirograph or deed which required a counterpart, as we call it, they engrossed it twice upon one piece of parchment contrariwise, leaving a space between, in which they wrote in great letters the word chirograph, and then cut the parchment in two through the middle of the word, concluding the deed with "*In cujus rei testimonium utraque pars mutuo scriptis presentibus fide media sigillum suum fecit apponi.*" This was afterwards called *dividenda*, because the parchment was so divided or cut. And the first use of these chirographs was in Henry III.'s time. Chirograph was also of old used for a fine. And this manner of engrossing the fine and cutting the parchment in two pieces continued to be observed until the abolition of fines by the stat. 3 & 4 Will, 4, c. 74. Cowel. See also next title.

CHIROGRAPHER OF FINES. *Chirographus finium et concordiarum* (from the Greek *χειρόγραφον*, which is a compound of *χειρ*, a hand, and *γράφω*, I write). It signified in the Law the officer of the Common Pleas who engrossed fines in that Court so as to be acknowledged into a perpetual record, after they had been acknowledged and fully passed by those officers by whom they were previously examined. Cowel.

CHIVALRY (*servitium, militare*). This word comes from the French *chevalier*; and signifies that peculiar species of tenure by which lands were formerly held, called tenure by knights' service. It is of a martial and military nature, and obliges the tenant to perform some noble or military office unto his lord.

CHLOROFORM. Administering this drug with intent to commit an indictable offence is, by the stat. 24 & 25 Vict. c. 100, s. 22, made a felony, punishable with penal servitude for life or five years, or with imprisonment for two years with or without hard labour.

CHOSE (*thing*). This word is generally used in combination with others. The

CHOSE—continued.

most common combinations in which it is found are the following:—(1.) Chose local; (2.) Chose transitory; and (3.) Chose in action. (1.) Chose local is such a thing as is annexed to a place; thus, a mill is a chose local. (2.) Chose transitory means anything of a movable or transitory nature, which may be taken or carried away from one place to another. (3.) Chose in action (the most ordinary combination) is a phrase which is sometimes used to signify a right of bringing an action, and at others the thing itself which forms the subject matter of that right, or with regard to which that right is exercised; but it more properly includes the idea both of the thing itself and of the right of action as annexed to it. Thus, when it is said that a debt is a chose in action, the phrase conveys the idea not only of the thing itself, i.e., the debt, but also of the right of action or of recovery possessed by the person to whom the debt is due. When it is said that a chose in action cannot be assigned, it means that a thing to which a right of action is annexed cannot be transferred to another together with such right. Thus if A. owes B. £10, it is obvious that the latter has a debt, and also a right of recovering such debt against A.; now if B. were to assign or transfer his debt, together with his right of recovery, to C., this would be assigning a chose in action, which the law would not allow for the reasons stated in Co. Litt. 214 a, 266 a; 2 Roll. 45; *Mouldale v. Birchall*, Sid. 212. But more recently such assignments came to be allowed in Equity, and latterly crossed in some instances from Equity to Law, until eventually, by the Judicature Act, 1873, a chose in action has been made assignable in every case.

CHRISTIANITY. To bring this religion into ridicule or contempt is an offence against the Common Law of England, and as such is indictable. Holt, Libel, 69, n.

CHURCH. A place of worship, to be adjudged a church in law must have administration of the sacraments and sepulture annexed to it (Cowel). The fabric of the church consists of the nave or body of the church, with the aisles, the chancel, and the steeple.

See also titles **ADVOWSON**; **BURIAL**; **PARISH**; **FEWS**; and two next titles.

CHURCH-RATES. These were abolished as a compulsory assessment by the stat. 31 & 32 Vict. c. 109, and the payment of these or of any analogous assessment to be collected instead of them was made voluntary. The assessment while it existed was made in a vestry meeting; it fell generally upon all such property as was rateable

CHURCH RATES—*continued.*

to the poor-rate; it went to support the temporal necessities of the church.

CHURCHWARDENS. These, although laymen, are a species of ecclesiastical officers, being sworn in by the archdeacon or bishop of the diocese. They are entrusted generally with seeing to the repairs, management, and good order of the church, and to decency of conduct therein. They are a body corporate, and may as such be sued for the goods of the church, and are answerable to their successors in office. Usually, the parishioners elect one, and the parson the other churchwarden, the customary number being two. In virtue of their appointment, churchwardens are overseers of the poor.

CHURLE. Among the Anglo-Saxons a tenant at will of free condition, who held land from the thanes on condition of rent or services. They were of two sorts; (1.), one who hired the lord's outland or teneimentary land, as our farmers do now; (2), the other, who tilled and manured the inland or demesnes, (yielding work and not rent), and were thence called his sockmen or ploughmen. Spelman on Feuds; Cowel.

CINQUE PORTS (*cinque portus*). Five important havens, formerly esteemed the most important in the kingdom. They were Dover, Sandwich, Romney, Hastings, and Hythe; Winchelsea and Rye have since been added to the number. They have similar franchises in many respects with the counties Palatine, and particularly an exclusive jurisdiction (before the mayor jurats of the ports), in which the king's ordinary writ did not run. These ports have a governor called the Lord Warden of the Cinque Ports, who has the authority of an admiral amongst them, and used to send out writs in his own name. But the king's writ now runs to, and is executed in, these ports in like manner as in other parts of the kingdom. See C. L. P. Act, 1852, s. 122.

CIRCUITS. These are the routes taken by the several judges in holding the assizes. The stat. 3 & 4 Will. 4, c. 71, regulates the appointment of convenient places for holding the assizes; and the stat. 26 & 27 Vict. c. 122, enables the Queen in Council to alter the circuits. As at present constituted, there are eight circuits in England and Wales, viz., Home, Norfolk, Midland, Northern, Oxford, Western, South Wales, and North Wales, but a new arrangement is imminent.

CIRCUITY OF ACTION. Is where a party to an action, by an indirect and circuitous course of legal proceeding, makes

CIRCUITY OF ACTION—*continued.*

two or more actions necessary, in order to obtain that justice between all the parties concerned in the transaction, which by a more direct course might have been gained in a single action. As in an action on a contract, in which the defendant, instead of giving in evidence a breach of the warranty in mitigation of damages, allows the plaintiff to recover the full amount of the contract in the first action, and then subsequently commences against him a cross action to regain the amount to which the consideration had failed. (*See title CROSS ACTION.*) Formerly indeed, he was compelled to bring a cross action, and had no other remedy, but more recently "the cases have established that the breach of the warranty may be given in evidence in mitigation of damages, on the principle it should seem, of avoiding circuity of action." *Per Tenterden, C.J., 2 B. & Ad. 462.*

CIRCULAR NOTES. These are similar instruments to Letters of Credit. (*See that title.*) They are drawn by bankers in this country upon their foreign correspondents in favour of persons travelling abroad. The correspondents must be satisfied of the identity of the applicant before payment; and the requisite proof of such identity is usually furnished, upon the applicant's producing a letter with his signature, by a comparison of the signatures.

CIRCUMSPECTE AGATIS. The title of the statute 13 Edward 1, regulating the jurisdiction of the temporal and ecclesiastical Courts. The date usually assigned to this statute is 1285; but there seems to be reason to believe that it was not in existence at that period. It was, however, cited as early as 19 Edward 3. It originally was not a statute, but a writ supposed to have been issued in pursuance of the statute called *Articuli Cleri* (*see that title*), of which, in the form in which it is printed both in the authentic and ordinary edition of the statutes, it is a repetition and abridgement. It was probably a writ of mandate, framed for the purpose of being issued by the king to his judges in behalf of the Spiritual Courts, in or after 1315, and embodying what were then supposed to be the legitimate objects of the jurisdiction of those latter Courts. Its authority as a statute, is, however, no longer questioned. 12 Ad. & El. 315.

CIRCUMSTANTIAL EVIDENCE. That evidence which may be afforded by particular circumstances. It is called circumstantial evidence in contradistinction to that species of evidence which is of a more positive and unequivocal nature. Whence the latter is sometimes called *direct* evidence, and in that case circumstantial is

CIRCUMSTANTIAL EVIDENCE—*contd.*

designated *indirect*. Sometimes also, it is called the doctrine of presumptions; because when the fact itself cannot be proved it may be presumed, by the proof of such circumstances as either necessarily or usually attend such facts, being in the former case conclusive, and in the latter more or less cogent only.

See title **PRESUMPTION**.

CIRCUMSTANTIBUS, TALES DE. Literally, like persons out of those present or standing by. This phrase is applied to the making up the number of persons on a jury, by taking some of the casual bystanders, who happen to be qualified for serving on a jury. This takes place when the jurors who are empanelled, from some cause or other, do not appear, or, if appearing, are challenged by either party, and so disqualified.

See title **CHALLENGE**.

CITATION. The process used in the Ecclesiastical Courts and Court of Probate and Divorce, to call the party—defendant or respondent, before them. It is the first step which is taken in the case, and is somewhat analogous to the writ of summons at Common Law.

CIVIL DEATH. If a man entered into a monastery, or abjured the realm, he was formerly, and if he is attainted of treason or felony he still is, dead in law, and therefore if an estate be granted to any one for his life generally, it would determine by such civil death. For which reason in conveyances the grant is usually made "for the term of a man's *natural* life," which can only determine by his natural death. 3 Inst. 218; 3 P. Wms. 37, n. (B); 2 Rep. 48 b.

CIVILITER (*civilly*.) In a man's civil character or position, or by civil, in opposition to criminal, process; as "sheriffs who execute process at their peril are answerable *civiliter* for what they do upon it," or "a man may, without his own fault, be possessed of a horse which has been stolen, but nevertheless he is answerable *civiliter* to the true owner of it." 1 B. & P. 409, per Rooke, J.

CIVIL LAW. In its general signification is the established law of every particular nation, commonwealth, or city, and is the same with that which is called Municipal Law. In its particular signification, however, it usually means the Roman law, as comprised in the Institutes, Code, and Digest of the Emperor Justinian.

CIVIL LIST, SETTLEMENT OF. Prior to the Revolution of 1688, it was customary to grant to the king at the commencement of each reign the ordinary revenues

CIVIL LIST, SETTLEMENT OF—*contd.*

of the Crown (see title **TAXATION**), without imposing any limitation upon his personal expenditure. These revenues were estimated in times of peace to be sufficient for the support of his majesty's person and household, and for the maintenance of his civil and military government; for all extraordinary occasions, such as times of war, grants of extraordinary supplies were made to him. In the reign of Charles II. the principle of appropriating the supplies to the specific services had been formally established, and such appropriation was in fact made the condition, or one of the conditions, upon which the same were granted; but notwithstanding that such was the recognised principle or condition of the grant, it is certain that Charles II. misapplied towards his own private pleasures a large amount of these supplies.

Accordingly, upon the accession of William and Mary, Parliament provided separately for the king's *civil list* a sum of £700,000, derived in part from the hereditary revenues of the Crown, and partly from the excise duties, and voted in addition the sum of £500,000 for the other expenses of government not included in the civil list. At this period the civil list embraced not only the support of the king's person and dignity, but also the salaries of civil officers and pensions.

In this condition the civil list remained during the reigns of Anne, George I., and George II.; but on the accession of George III. that king gave up the hereditary revenues of the Crown in England altogether, in consideration of a civil list of £800,000 a year. He still retained, however, the hereditary revenues of the Crown in Scotland, the Duchies of Cornwall and Lancaster, the Irish civil list, and various other sources of revenue, amounting not unfrequently to the annual sum of £4,700,000 odd. But notwithstanding this vast income, George III. was always in debt, through the great multiplication of pensions and sinecure places, these being the means which that prince adopted with a view to increasing the influence of the Crown.

In view of these abuses, Mr. Burke in 1780 proposed his scheme of "economic reform;" and in 1782, the Rockingham Civil List Act was passed, in virtue of which many useless offices were abolished, the pension list was diminished, and the civil list expenditure was divided under eight heads. But the civil list was still suffered to comprise (in addition to the support of the king's person and dignity) the expenses of the civil government; viz. the salaries of judges, &c., annuities to members of the royal family, salaries in the

CLERK OF THE HOUSE OF COMMONS

—continued.

officers are employed in the House of Lords. By the 33 Geo. 3, c. 13, the clerk of Parliament is directed to indorse on every Act, immediately after the title thereof, the day, month, and year when the same shall have passed, and shall have received the royal assent; and such indorsement shall be taken to be part of the Act, and shall be the date of its commencement, where no other commencement shall have been provided by the Act.

CLERK OF THE PARLIAMENT ROLLS.

An officer in the High Court of Parliament, who records all things done therein, and engrosses them fairly on parchment rolls, for their better preservation to posterity. There is one of these officers to each House of Parliament. Cowel.

See also title **CLERK OF THE HOUSE OF COMMONS.**

CLERK OF THE PARLIAMENTS.

An officer of the House of Lords, whose duties are similar to those of the chief clerk in the House of Commons.

See title **CLERK OF THE HOUSE OF COMMONS.**

CLERK OF THE PEACE. An officer belonging to the sessions of the peace, whose duty it is to read indictments, to enrol the Acts, draw the process, and perform various other duties connected with the administration of justice at the sessions.

CLERK OF THE PETTY BAG. An officer of the Court of Chancery, whose duty it used to be to record the return of all inquisitions out of every shire; to make out patents of customers, gaugers, controllers, and aulnagers; all *congés d'elire* for bishops; the summons of the nobility, clergy, and burgesses to Parliament, &c.—33 Hen. 8, c. 22; Cowel. But most, if not all, of these functions have been superseded.

CLERK OF THE PRIVY SEAL. There are four of these officers, who attend the lord privy seal, or in the absence of a lord privy seal, the principal secretary of state. Their duty is to write and make out all things that are sent by warrant from the signet to the privy seal, and which are to be passed to the great seal; and also to make out privy seals (as they are termed) upon any special occasion of his majesty's affairs, as for the loan of money and such like purposes. 27 Hen. 8, c. 11. Cowel.

CLERK OF THE SIGNET. An officer whose duty it is to attend on his majesty's principal secretary, who always has the custody of the privy signet, as well for the purpose of sealing his majesty's private letters, as also grants which pass his majesty's hand by bill signed: there are four of these officers. 27 Hen. 8, c. 11. Cowel.

CLOSE ROLLS and CLOSE WRITS.

Certain letters of the king sealed with his great seal and directed to particular persons and for particular purposes, and not being proper for public inspection, are closed up and sealed on the outside, and are thence called *writs close* (*literæ clausæ*), and are recorded in the *close rolls* in the same manner as others are in the *patent rolls* (*literæ patentés*), or open letters.

CLUBS. These are companies, but not being for profit are not within the meaning of the Winding-up Acts (*In re St. James's Club*, 2 De G. M. & G. 383). They are essentially social, and the exclusion of a member, if not wanton, is without remedy. *Hopkinson v. Exeter (Marquess)*, Lj R. 5 Eq. 63.

COALS. By stat. 5 & 6 Will. 4, c. 63, all coals must be sold by weight and not by measure, under a penalty of 40s. By stat. 23 & 24 Vict. c. 191, provision is made for the inspection and regulation of coal mines in Great Britain; and under the Act 25 & 26 Vict. c. 79, amending same, it is not lawful for the owner of any new mine nor (after 1st January, 1865) of any existing mine, to work same by a single shaft, but two shafts admitting of distinct means of ingress and egress are required, but need not belong to one and the same mine, provided they are in communication.

CODICILL. A supplement to a will, or an addition made by the testator and annexed to the will, being written for the explanation or alteration or for the purpose of making some addition to, or some subtraction from, the dispositions of the testator as contained in his will. In the Roman Law, a codicil was an informal will; but in English Law, the formalities of execution and of attestation are as strict in the case of codicils as in that of wills.

See title **WILLS.**

COGNISANCE or CONUSANCE. This word has several significations. 1st. It signifies an acknowledgment. It is used in this sense when applied to fines, or those fictitious suits, by means of which estates in lands were transferred from one party to another. Thus a fine "*sur cognisance de droit*" signified a fine "upon acknowledgment of the right." 2nd. The word is applied to that plea or answer put in by the defendant in an action of replevin, when he acknowledges the taking of the distress in respect of which the action is brought, but insists that such taking was legal, as he acted with the command of another who had a right to distrain. Here, it will be observed, the defendant makes an acknowledgment of the fact charged against him, but offers a

COGNISANCE, or CONUSANCE—contd.

legal excuse for his conduct. (See *Trevilian v. Pynes*, 1 Salk, 107; *Chambers v. Donaldson*, 11 East, 65.) 3rd. It is used in the sense of judicial notice or superintendence. Thus cognisance of pleas signifies the right or privilege granted by the Crown to any person or body corporate, not only to hold pleas within a particular jurisdiction, but also to take cognisance of them, i.e., to take judicial notice or superintendence of them, in other words, to have jurisdiction to hear them.

COGNOVIT ACTIONEM. An instrument signed by a defendant in an action, *confessing* the plaintiff's demand to be just. The defendant who signs this cognovit thereby empowers the plaintiff to sign judgment against him, in default of his paying the plaintiff the sum due to him within the time mentioned in the cognovit. Under the stat. 1 & 2 Vict. c. 110, s. 9, every such cognovit must be attested by an attorney, who must also under stat. 32 & 33 Vict. c. 62, s. 24, have explained to the debtor the nature of the instrument. And under the last-mentioned statute, s. 26, every cognovit must be filed with the clerk of docketts and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof, otherwise the same is void as being fraudulent against creditors.

See also title ATTORNEY, POWER OF.

COIF. Our serjeants-at-law are called serjeants of the coif, from the circumstance of the lawn coif which they wear on their head, under their caps, when they are elevated to that rank. It was originally used to cover the crown of the head, which was closely shaved, and a border of hair left round the lower part, which made it look like a crown, and was thence called *corona clericalis*, or *tonsuram clericalem*. Cowel.

COLLATERAL (*collateralis*), from the Lat. *laterale*, that which hangs by the side. Its legal signification does not differ from its common acceptation. Thus a collateral assurance signifies an assurance beside the principal one. So when a man mortgages his estates as security to a party lending him a sum of money, he also may enter into a bond, as an additional or collateral security. A collateral security is, therefore, something in addition to the direct security, and in its nature usually subordinate to it; and it is in the nature of a double security, so that when one fails, the other may be resorted to. See also succeeding titles.

COLLATERAL CONSANGUINITY, or COLLATERAL KINDRED. That which

COLLATERAL CONSANGUINITY, or COLLATERAL KINDRED—continued.

exists between persons who are derived from the same stock or ancestors, however remote. Every person who is descended or propagated from the same stem (i.e., from the same male or female lineal ancestor) from which any other particular person is descended or propagated, and who is neither the immediate parent or progenitor, nor the progeny of such particular person, is properly and aptly denominated or defined to be a *collateral* relative. And when any person is the collateral relative of any other person, all the descendants from such persons, reciprocally and respectively, are collateral relations.

COLLATERAL ISSUE. When a prisoner has been tried and convicted, and he then pleads in bar of execution diversity of person, i.e., that he is not the same person who was attained, and the like; this question of fact, whether or not he is the same person, is called a collateral issue, and a jury is then empaneled to try this issue, viz., the identity of his person. It is a general rule of evidence, that whatever would raise a collateral issue is to be excluded, unless, *semble*, the case is one in which the collateral issue should be settled by way of preliminary to the chief issue.

COLLATERAL WARRANTY. In alienating property by deed, there was usually a clause in it called the clause of warranty, whereby the grantor, for himself and his heirs, warranted and secured to the grantee the estate so granted. This warranty was either *lineal* or *collateral*. Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son. *Collateral warranty* was where the heir's title to the land neither was nor could have been derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother.

See also title WARRANTY.

COLLATION TO A BENEFICE. Advowsons are either *presentative*, *collative*, or *donative*. (1.) An advowson presentative is where the patron has a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified, and this is the most usual kind of advowson. (2.) An

COLLATION TO A BENEFICE—contd.

advowson *collative* is where the bishop and patron are one and the same person, in which case the bishop cannot present to himself, but in the one act of collation, or conferring of the benefice, he does all that is usually done in presentative advowsons by both presentation and institution. 3. Regarding the advowson donative, see title ADVOWSON.

COLLIGENDUM BONA DEFUNCTI (Letters *ad*). When a person dies intestate and leaves no representatives or creditors to administer, or leaving such representatives and creditors, they refuse to take out administration, &c., the judge of the Court of Probate may commit administration to such discreet person as he approves of, or grant him these letters *ad colligendum bona defuncti* (to collect the goods of the deceased). Such a grant is purely official, and does not constitute him executor or administrator, his only business being to take care of the goods, and to do other acts for the benefit of those who are entitled to the property of the deceased.

See title ADMINISTRATION, LETTERS OF.

COLLISION: See title SHIPPING.

COLLUSION. A deceitful agreement or compact between two or more persons for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right. Bro. tit. Collusion; *Les Termes de la Ley*. As a general rule, collusion between the parties to an action is fatal to the success of it, e.g., in proceedings for a divorce; but in particular instances it is not so, as in the old proceedings for suffering a common recovery.

COLONIES. As a general rule, a colony acquired by discovery and occupation is to be governed by the laws of England; and if acquired by conquest, then by its own laws, so far as they are not contrary to morality, and until the conqueror sees fit to change them. But when the laws of England depend upon circumstances that are peculiar to England, and which do not apply to the colonies also, then these particular laws do not hold good in the colonies, e.g., the Law of Mortmain in the Island of Grenada. *Attorney-General v. Stewart*, 2 Mer. 143; and see *Mayor of Lyons v. East India Co.*, 1 Moo. P. C. C. 175, as to India.

COLOUR. A technical term used in pleading to signify that apparent right of the opposite party, the admission of which is required in all pleadings, by way of confession and avoidance. Of such pleadings it is, as the name imports, of their

COLOUR—continued.

very essence to *confess* the truth of the allegation which they propose to answer or avoid, which formerly was done by an introductory sentence—“*True it is that, &c.*,” preceding the defence relied upon in answer. But though this formal admission is now generally abandoned, it is still essential that the confession clearly appear on the face of the pleading. In many places it is absolute and unqualified; as, in an action on a covenant, a plea of release admits absolutely the execution of the covenant and the breach complained of; but in some the confession is of a qualified kind, or *sub modo* only. Thus, to an action of trespass for taking the plaintiff's corn, a plea that the defendant was rector, and that the corn was set out for tithe, and that he took it as such rector, would be a good plea by way of confession and avoidance. For though there is no direct confession that the defendant took the plaintiff's corn as alleged in the declaration, but, on the contrary, an assertion of a title to the corn in himself, yet the plea implies that the plaintiff was the original owner, and entitled against all the world, except the defendant. There is, therefore, a confession, so far as to admit some sort of apparent right or colour of claim in the plaintiff, and is therefore within the rule laid down by pleadors on this subject; that *pleadings in confession and avoidance should give colour*. The colour thus explained, inherent in the structure of all pleadings in confession and avoidance, is termed *implied colour*, to distinguish it from *express colour*, which, instead of an implied admission, is a direct and positive assertion of an apparent title in the opposite party, introduced into pleadings of this nature to satisfy the rule as to confession or admission. This latter kind of colour is employed, or used to be employed, in cases where the pleader was desirous of pleading by way of confession and avoidance to a traverse, and the facts of his case admitted no sort of title in the opposite party, or, in other words, gave no implied colour. He then, for the *express* purpose of giving colour, inserted in his plea a fictitious allegation of some *colourable but insufficient* title in the plaintiff, which he at the same time avoided by the preferable title of the defendant. And in his replication the plaintiff was not allowed to traverse the fictitious matter thus suggested. The practice of giving *express colour* came to be almost entirely confined to trespass and trover, and in those actions extended to no other pleading than the plea. The form adopted in trespass to land was to allege a defective charter of demise, and in trespass for taking goods,

COLOUR—*continued.*

that the defendant delivered the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. By these allegations a colourable or apparent right was given to the plaintiff in both cases, and the pleas were rendered good, which otherwise would have been defective for want of colour (Stephen on Pl. 229, *et seq.*; 1 Ch. Pl. 504; 3 Reeves, E. L. 438.) But under the C. L. P. Act, 1852, s. 64, express colour is no longer necessary, and the better opinion is that under s. 49 of that Act it is abolished.

COMBINATION OF WORKMEN. The stat. 22 Vict. c. 34, enacts, in explanation of the stat. 6 Geo. 4, c. 129, that no workman, by reason merely of his combining with other workmen for the purpose of fixing the rate of wages, or for the purpose of peaceably and without threat or intimidation dissuading others from working with a view to fixing the rate of wages, shall be deemed or taken to be guilty of the offence of molestation or obstruction; but the Act is not to authorize a workman to break his contract. See also Trades Unions Act, 1871 (34 & 35 Vict. c. 31), and Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32).

COMMANDITE: See title SOCIÉTÉ.

COMMENDAM (*ecclēsia commendata*). The holding a living or benefice in *commendam* is (where a vacancy occurs) holding such living commended by the Crown until a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual, being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*. These *commendams* are now seldom granted except to bishops.

See also next title.

COMMENDATORS. Secular persons on whom benefices or church livings are bestowed. They are so called because the benefices were commended and intrusted to their oversight; they are not proprietors, but only a kind of trustees. Where the bishop is commendatory, the grant is usually made to him while he continues bishop of the particular diocese, and not longer, the intention of the grant being to augment the revenues of the bishopric where it is poor.

See also title PLURALITIES.

COMMISSARY (*commissarius*). In the Ecclesiastical Law is a title applied to those who exercise spiritual jurisdiction in those parts of the diocese which are too far distant from the chief city for the chancellor to call the people of the bishop's principal court without occasioning them great in-

COMMISSARY—*continued.*

convenience. These officers were ordained to supply the bishop's office in the distant places of his diocese, or in such parishes as were peculiar to the bishop, and were exempted from the jurisdiction of the archdeacon (Lyndewood's *Provin.*; Cowel). But in more modern times, the commissary acts generally in relief of the bishop or archbishop, and as his officer.

COMMISSION. In our law is much the same as *delegatio* with the civilians, and is commonly understood to signify the warrant, authority, or letters patent, which empower men to perform certain acts, or to exercise jurisdiction either ordinary or extraordinary. In its popular sense it frequently signifies the persons who act by virtue of such an authority. There are various sorts of commissions, which will be found under the following titles.

COMMISSIONS OF ASSIZE. Commissions empowering the judges to sit on the circuit, for the purpose of holding the assizes.

COMMISSION OF BANKRUPT. A commission or authority formerly granted by the Lord Chancellor to such discreet persons as he should think proper, to examine the bankrupt in all matters relating to his trade and effects, and to perform various other important duties connected with bankruptcy matters; these persons were thence called *commissioners of bankruptcy*, and had in most respects the powers and privileges of judges in their own Courts. But regularly constituted Courts and judges in bankruptcy cases have now superseded such commissions and commissioners.

See title BANKRUPTCY.

COMMISSION OF CHARITABLE USES. A commission issuing out of the Court of Chancery to the bishop and others, when lands which are given to charitable uses have been misemployed, or there is any fraud or dispute concerning them, to inquire of and redress the same.

COMMISSION OF DELEGATES. When any sentence was given in any ecclesiastical cause by the archbishop, this commission under the great seal was directed to certain persons, usually lords, bishops, and judges of the law, to sit and hear an appeal of the same to the King in the Court of Chancery. But latterly the Judicial Committee of the Privy Council has supplied the place of this commission; and the Court of Appeal will take the place of the Judicial Committee under the Judicature Act, 1873.

COMMISSION TO EXAMINE WITNESSES. When a cause of action arises in a foreign country, and the witnesses reside

COMMISSION TO EXAMINE WITNESSES—continued.

there, or in a cause of action arising in England, where the witnesses are abroad or are shortly to leave the kingdom; or if witnesses residing at home are aged and infirm, and therefore cannot come to Court; in any of these cases a Court of Equity will grant a *commission* to certain persons to attend these witnesses wherever they may reside, and to examine them and take down their depositions in writing upon the spot, and these depositions are then received in Court as valid evidence in the cause.

See also titles EVIDENCE; WITNESSES.

COMMISSION OF LUNACY. A commission issuing out of Chancery authorizing certain persons to inquire whether a person represented to be a lunatic is so or not, in order that, if he is a lunatic, the king may have the care of his estate. The masters in lunacy at the present day are permanent officers appointed to discharge the duties of these commissions, under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86).

COMMISSION OF OYER AND TERMINER: See title OYER AND TERMINER.

COMMISSION OF THE PEACE. A commission from the king under the great seal, appointing persons therein named jointly and separately justices of the peace.

See title JUSTICE.

COMMISSION TO TAKE ANSWERS IN EQUITY. When a defendant in a suit lived more than twenty miles from London, there might have been a *commission* granted to take his answer in the country, where the commissioners administered to him the usual oath, and then the answer being sealed up, either one of the commissioners carried it up to Court, or it was sent by a messenger, who swore that he received it from one of the commissioners, and that the same had not been opened or altered since he received it. But now such an answer may be sworn in the country before any solicitor of the Court who is appointed a commissioner to administer oaths in Chancery.

COMMITTEE. An assembly of persons to whom matters are referred. A *committee* of the House of Commons is a *committee* to whom a bill after the second reading is committed, that is, referred; and is either selected by the House in matters of small importance, or else upon a bill of consequence the House resolves itself into a *committee* of the whole house. A *committee* of the whole House is formed of every member; and to form it, the Speaker quits the chair (another member being appointed chairman), and the Speaker may in that case sit and debate as a private member. In

COMMITTEE—continued.

these *committees* the bill is debated clause by clause, amendments are made, the blanks are filled up, and sometimes the bill is almost entirely remodelled. After it has gone through this committee, it is again brought before the House for re-consideration, after which it is read a third time, and then passed or not passed, as the case may be. A *committee* also signifies the person or friend to whom the Lord Chancellor *commits* the care of an idiot or lunatic.

COMMITTEE OF SUPPLY. A committee of supply is a committee of the House of Commons, in which the grants of money necessary for the public service are voted, after the estimates of the sums required by the various public departments have been laid before the House.

COMMITTEE OF WAYS AND MEANS. This committee is one which follows next in order to a committee of supply in the financial business of the House of Commons; and its object is to consider the ways and means of raising the supply which has previously been granted in the other committee. The difference between them is that one controls, the other provides.

COMMITTEE OF WHOLE HOUSE: See title CHAIRMAN OF COMMITTEES OF THE WHOLE HOUSE.

COMMITTEE ON PRIVATE BILLS. The difference between a committee on a private bill and a committee on a public bill is, that while the latter consists of the House itself, with a chairman of committees presiding instead of the Speaker, the former consists of a selected number of members who sit in a committee room and take evidence for and against the bill; the witnesses being examined by counsel as in a Court of Justice. In the Commons' committees on private bills, the public are admitted; but from the Lords' committees they are excluded.

COMMITTEE, SELECT. A select committee consists of a certain number of members of either House of Parliament, appointed to inquire into and report upon matters specially referred to them. It is called a select committee, as distinguished from a committee of the whole house, a committee of supply, a committee of ways and means, &c.; and it usually conducts its proceedings in a separate apartment provided for the purpose, and not in the body of the House itself. Among the most important of this class of committees, railway committees may be instanced as examples.

COMMON, RIGHT OF. Is a right which one person who is not the owner has of taking some part of the produce of land

COMMON, RIGHT OF—*continued.*

belonging to another. There are four kinds of rights of common, viz.:

- (1.) Common of Pasture, which may be, either
 - (a.) Appendant (*see that title*); or
 - (b.) Appurtenant (*see that title*); or
 - (c.) *Pur cause de vicinage* (*see that title*); or
 - (d.) In Gross (*see that title*);
- (2.) Common of Piscary, as to which, *see title FISHERY*;
- (3.) Common of Estovers, as to which, *see title ESTOVERS*;
- (4.) Common of Turbary, as to which, *see title TURBARY*.

As a general rule, rights of common are acquired in the same manner as easements (*see that title*), viz., either

- (1.) By grant; or
- (2.) By prescription, which implies a grant.

And the Prescription Act, 2 & 3 Will. 4, c. 71, applies to all varieties of rights of common, for the acquisition of which it appoints thirty years and sixty years, the former conferring a title defeasible otherwise than with reference to time, and the latter a title defeasible by production of written evidence only.

Similarly, the remedies for disturbance of a right of common are the same as for the denial or obstruction of an easement, viz.:-

- (1.) *Case*, which is substituted for the old right of admeasurement;
- (2.) *Abatement*; and
- (3.) *Bill in Equity*.

Rights of common may be extinguished in one or other of the following ways:-

- (1.) By unity of possession;
- (2.) By release;
- (3.) By severance;
- (4.) By enfranchisement; or
- (5.) By inclosure.

See also titles APPROVEMENT; INCLOSURE.

COMMON BAR. A plea was so termed, which was frequently pleaded by a defendant in an action of trespass *quare clausum fregit*. In this action, if the plaintiff declared against the defendant for breaking his close in a certain parish, without otherwise particularizing or describing the close, and the defendant himself happened to have any freehold land in the same parish, he frequently affected to mistake the close in question for his own, and pleaded what was called the *common bar*, viz., that the close in which the trespass was committed was his own freehold, which compelled the plaintiff to new assign, i.e., to assign his cause of complaint over again, alleging that he brought his action in respect of a trespass committed upon a different close

COMMON BAR—*continued.*

from that claimed by the defendant as his own freehold. Now, however, a defendant cannot well affect ignorance with regard to the real close, as by a rule of Court (Hil. Term, 4 Will. 4), the plaintiff is now bound to *particularize* the close or place in the declaration by assigning to it its familiar name, or by describing it by its abutals or other sufficient description. The above-mentioned plea is also called a *bar at large* and a *blank bar*. Steph. Plead. 250, 4th ed.

COMMON BENCH. The Court of Common Pleas was formerly so called, because the causes of *common persons*, i.e., causes between subjects only, and in which the Crown had no interest, were tried and determined in that Court.

COMMON INTENDMENT. The plain common meaning of any writing, as apparent on the face of it, without straining or distorting the meaning of the writer. *Bar to common intendment* is an ordinary or general bar to the declaration of a plaintiff. Co. Litt. 78; Cowel.

COMMON INTENT. "Certainty in pleading has been stated by Lord Coke (Co. Litt. 303) to be of three sorts, viz., certainty to a *common intent*, to a certain intent in general, and to a certain intent in every particular. By a *common intent*, I understand, that when words are used which will bear a *natural* sense, and also an *artificial* one, or one to be made by argument or inference, the *natural* sense shall prevail, it is simply a rule of construction and not of addition. *Common intent*, cannot add to a sentence words which are omitted." *Per* Buller, J., *Dovaston v. Payne* 2 H. Bl. 527; 2 Smith's L. C. 132.

COMMON PLEAS (*communia placita*). One of the superior Courts of Common Law. The proceedings in this Court are the same as those in the other Courts of Common Law. The Court was fixed at Westminster by or in virtue of that provision in Magna Carta requiring *communia placita* to be held in some one definite place (*aliquo certo loco teneantur*).

See also title COURTS OF JUSTICE.

COMMON SERJEANT. Is a judicial officer attached to the corporation of the City of London, who assists the recorder in disposing of the criminal business at the Old Bailey Sessions.

COMMON TRAVERSE: *See title TRAVERSE.*

COMMUNE CONCILIUM REGNI ANGLIE. The general council of the realm assembled in Parliament. Cowel.

See also title COURTS OF JUSTICE.

COMMUNIA PLACITA NON TENENDA IN SCACCARIO. A writ directed to the treasurer and barons of the Exchequer, forbidding them to hold pleas between common persons in that Court; Reg. of Writs, 187; Cowel.

COMMUTATION OF TITHES: See title TITHES.

COMPARISON OF HANDWRITING: See title HANDWRITING.

COMPANY: See title JOINT STOCK COMPANY.

COMPENSATION. In French Law (as in Roman Law) is the set-off of English Law. See that title.

COMPENSATION. In English Law, denotes the pecuniary sum awarded under railway and other statutes, in payment and compensation of and for lands and buildings taken compulsorily or by agreement for public purposes. The chief statute upon the matter is the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

COMPOSITION WITH CREDITORS. As well by the Common Law as under the Bankruptcy Act, 1869, it is lawful for a debtor in embarrassed circumstances to come to an arrangement with his creditors to pay them so much in the pound, and to be released or forgiven by them the rest. The agreement is usually carried out by means of a composition deed, but such a deed is not requisite by the Common Law, there being a sufficient consideration to support the arrangement as a simple contract merely, in the mutual agreement of all the creditors in consideration of the agreements of the others to assent to the composition (*Sibree v. Tripp*, 15 M. & W. 23). It is necessary by the Common Law that all the creditors should have assented to the composition; but under the Bankruptcy Act, 1869, a majority in number and three-fourths in value may bind the minority, see sect. 126.

See also titles LIQUIDATION; BANKRUPTCY.

COMPOUNDING FELONY, or THEFT-BOTE. Where a person has been robbed, and he knows the felon, and receives back from him his goods that were stolen, or some other amends, upon agreement not to prosecute, this is a misdemeanour.

See also title ADVERTISEMENT.

COMPROMISE OF SUIT. When a suit is not carried through to verdict, or decree, or judgment, but the parties agree upon certain terms, which include a stay of proceedings, they are said to compromise the suit. A mere doubtfulness of right is a

COMPROMISE OF SUIT—continued.

sufficient consideration to support a compromise (*Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449). Counsel for the parties may also compromise a suit without the authority and even against the wishes of their clients. The parties themselves may compromise it, but without prejudice to their solicitor's lien. *Wright v. Burrows*, 3 C. B. 344.

COMPURGATORS. Persons who swear they believe the oath of another person made in defence of his own innocence. Such was the case with the clergy, who, when accused of any capital crime, were not only required to make oath of their own innocence, but also to produce a certain number of persons, called *compurgators*, to swear that they believed the oath of the accused. It is a rude form of evidence, the modern phase of which is *character-evidence*. See that title.

COMPUTE, RULE TO. In cases where the plaintiff had an interlocutory judgment, and the amount of damages was a simple matter of calculation, and no evidence was required to ascertain the amount, beyond what was apparent on the face of the pleadings, the Court, instead of putting the plaintiff to execute a writ of inquiry, would refer it to the master to compute principal and interest. This course was usually pursued when interlocutory judgment had been signed in an action on a bill of exchange, or promissory note, or banker's cheque. The Courts in the first instance granted a rule to shew cause why it should not be referred to the master to compute principal and interest, &c., which rule had to be served upon the defendant, and if cause was not shewn the rule was made absolute (*Bayley's Pr.* 221; *Lush's Pr.* 706). But, under the present practice, as regulated by the C. L. P. Act, 1852, in the case of judgment by default no rule to compute is necessary (s. 92); and in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default is final (s. 93); while in actions in which the amount of damage is substantially a matter of calculation, it is not necessary to issue a writ of inquiry, but the Court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters, who shall indorse his finding on the rule or order referring the matter to him, and the indorsement is to have the effect of a verdict upon a writ of inquiry (s. 94). The order of reference is obtained upon *summons*.

CONCLUSION TO THE COUNTRY. When a party in pleading traverses or denies a material fact or allegation advanced by his opponent, he usually concludes his plead-

CONCLUSION TO THE COUNTRY—contd.

ing with an offer that the issue so raised may be tried by a jury: this he does by stating that he "puts himself upon the country;" and a pleading which so concludes is then said to conclude to the country; and the technical phrase itself is termed a "*conclusion to the country*."

CONCORD (*concordia*). An agreement entered into between two or more persons, upon a trespass having been committed, by way of amends or satisfaction for the trespass. In that species of conveyance which was formerly in use, called a *fine*, the word "*concord*" also occurs; and here it signifies an agreement, called the *finis concordie*, between the parties, who are levying the fine of lands one to another, how and in what manner the lands shall pass; this concord is usually an acknowledgment from the deforciant that the lands in question are the right of the complainant; and from this *acknowledgment*, or *recognition* of right, the party levying the fine is called the *cognitor*, and he to whom it is levied the *cognizee*.

CONDEMNATION MONEY. The party who fails in a suit or action is sometimes said to be *condemned* in the action, whence the damages to which such failure has made him liable used to be frequently called *condemnation money*. Thus in proceedings to enforce a recognizance by writ of *scire facias* it is laid down that "these persons (the bail) stipulated that if the defendant should be condemned in the action, he should pay the *condemnation money*, or render himself into custody."

CONDITION. In French Law, the following peculiar distinctions are made:—

(1.) A condition is *casuelle*, when it depends on a chance or hazard;

(2.) A condition is *potestative*, when it depends on the accomplishment of something which is in the power of the party to accomplish;

(3.) A condition is *mixte*, when it depends partly on the will of the party and partly on the will of others;

(4.) A condition is *suspensive*, when it is the future and uncertain event, or present but unknown event, upon which an obligation takes or fails to take effect;

(5.) A condition is *resolutoire*, when it is the event which undoes an obligation which has already had effect as such.

CONDITIONS. At the Common Law, a condition, or the benefit of a condition, could only be reserved to the grantor, lessor, or assignor, and his real or personal representatives, and not to a stranger; but by the stat. 8 & 9 Vict. c. 106, s. 5,

CONDITIONS—continued.

under an indenture executed after the 1st of October, 1845, the benefit of a condition respecting any lands or tenements may be taken, although the taker thereof be not named a party to the same indenture.

A condition affecting freehold lands must be created, if not by the same deed, at all events by a deed executed and delivered at the same time as the deed which creates the estate; but a condition affecting chattels, rents, annuities, and such like, may be created subsequently to the principal deed.

And with reference to the *breach* of conditions:—

By the Common Law, no one could take advantage by entry of the breach of a condition, except persons who were parties or privies in right and representation. Therefore, by the Common Law, neither privies in law* (e.g., lords claiming by escheat) nor grantees and assignees of the reversion, could have such advantage of it. But by stat. 32 Hen. 8, c. 34, grantees and assignees now possess this right, whether the grant is of the whole or only of a part of the estate of the reversion, but not so as to apportion the condition; however, now, by stat. 22 & 23 Vict. c. 35, s. 3, such apportionment may be made where the reversion is split up into parts.

Even when lands are descendible by some rule or custom to a person other than the heir by the Common Law, e.g., in gavelkind lands, none but the heir by the Common Law may enter for the breach; although after such entry, the customary heir or heirs may enter on him, and enjoy along with him, if the custom so direct. But the right of taking advantage of a breach of condition being merely personal (1 Pres. Shop. T. 150), not even the heir at Common Law may enter for a condition broken in the lifetime of his ancestor.

See also succeeding titles.

CONDITIONS, IMPOSSIBLE. In Roman Law, a legacy subject to an impossible condition was valid, and was at once an absolute bequest; and this is also the rule as to bequests of personal property in English Law. Again, in Roman Law, a stipulation (i.e., contract) subject to an impossible condition was void altogether; and this is also the rule of the English Law as to such a contract in the general case. But a distinction has been taken, chiefly upon the words of the contract, between a condition which is already impossible, and known to be so to the con-

* Nevertheless if the condition were implied in law, privies in law might take advantage of the breach.

CONDITIONS, IMPOSSIBLE—continued.

tracting parties at the time of their contracting (in which case the contract is invariably void, as being simply foolish), and a condition which only subsequently to the contract becomes void, or the impossibility of which was unknown to the parties at the time of the contract (in which latter case the contract may or may not, according to the language, be and remain binding). See Leake on Contracts, 356.

CONDITIONS PRECEDENT AND SUBSEQUENT. These may be either *precedent* to the vesting of an estate or right of action, or *subsequent* thereto, and divesting the estate or right.

(a.) Conditions precedent and subsequent with reference to estates.

In the construction of personal bequests, where the condition is precedent, and there is no limitation over on its non-fulfilment, it is sufficient if it is performed in substance, when from unavoidable circumstances it cannot be fulfilled to the letter; but when there is a limitation over of the legacy on non-fulfilment of the condition, a strict and literal performance is required (1 Wh. Rep. Leg. 769). On the other hand, when the condition is subsequent, then, as being odious, it is construed with strictness, and to be of any avail to defeat an estate (whether vested or contingent), it must have been fulfilled to the letter (1 Wh. Rep. Leg. 783); for it is only reasonable that before a person is deprived of the benefit conferred upon him the literal event on which the forfeiture is to arise should happen, more especially if the benefit is already vested in enjoyment, and it makes no difference for that matter that the condition which is subsequent to the one estate is precedent to another, either introducing a fresh conditional limitation, or accelerating a limitation already in existence in remainder.

These principles may be illustrated by a reference to conditions of consent to marriage. Thus, if in the event of a legatee marrying without the consent of a trustee or executor, the legacy is to go over to another person, and either the trustee dies before the marriage, and before his consent is obtained, or the executor renounces, the interest of the prior legatee becomes absolute, and he or she may marry without consent without forfeiting the legacy. This is a condition subsequent. Again, if a condition which is precedent to some bequest requires the consent of three trustees to the marriage of the legatee, and one of those trustees dies, the approbation of the surviving two trustees previously to the marriage will be a sufficient compliance

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

with the condition; and in such a case, if the condition were subsequent, the happening of the like event would discharge the condition *in toto*, inasmuch as the literal performance was become impossible. See 1 Wh. Rep. Leg. 803.

(b.) Conditions precedent to the vesting of a right of action, also, conditions subsequent divesting the same.

The right of action is not complete without the previous performance, or else the remission, of all conditions precedent (if any) to the obligation attaching to the defendant; and therefore it is necessary to aver in the declaration a performance of all such conditions, or else a sufficient excuse for the non-performance thereof (*Grafton v. Eastern Counties Ry. Co.*, 8 Exch. 699). By the C. L. P. Act 1852, s. 57, it is made lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally; but this enactment does not relieve him from the necessity of averring specifically any excuse for a non-performance thereof, and in this specific averment both the conditions excused and the excuses of performance must be averred with particularity (*London Dock Co. v. Sinnott*, 8 E. & B. 347); but although the discharge of an obligation under seal can only be effected by a deed under seal, the discharge need not be so averred in the declaration (*Thames Haven Dock Co. v. Brymer*, 5 Exch. 696). A general averment of readiness and willingness to perform all conditions precedent is not sufficient in the case of a condition precedent which requires either performance or an excuse from performance (*Roberts v. Brett*, 6 C. B. (N.S.) 611). But where the acts to be done on the parts of the plaintiff and defendant are concurrent, the party who sues the other for non-performance of his part, need only aver a willingness and readiness to perform (*Morton v. Lamb*, 7 T. R. 125); and the rule is the same with respect to agreements under seal (*Glazebrook v. Woodrow*, 8 T. R. 366). And when the declaration sufficiently shews that the defendant has absolutely incapacitated himself from performing his part of the contract it is not necessary to aver either the performance of conditions precedent, or a readiness and willingness to perform the same (*Hochster v. De la Tour*, 2 E. & B. 678). Bankruptcy has been decided to be such an incapacitation in the case of a contract for the sale of goods to be paid for by instalments (*In re Edwards, Ex parte Chalmers*, 21 W. R. 138), confirmed on appeal to the Lords Justices in Chancery.

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

Conditions precedent or subsequent may be *void conditions*.

There is, however, a very great distinction between real property on the one hand and personal property on the other, with reference to the effect of such conditions being void; for real property is governed entirely by the Common Law, whereas personal property is largely subject to rules derived from the Roman Civil Law. Thus, firstly, with reference to real property, if a condition in restraint of marriage is general and therefore void, then,—

(a.) If the condition is precedent, no estate or interest will arise, because the estate was only to arise upon the fulfilment of the condition, which is impossible, and the Common Law will not, to the *prejudice of the heir*, dispense with the fulfilment of the condition; but

(b.) If the condition is subsequent, the estate to which it is annexed will become freed from the condition and be absolute.

Secondly, with reference to personal estate, if a condition in restraint of marriage is general and therefore void, then,—

(a.) If the condition is precedent, the bequest will take effect as if no condition had been imposed; and

(b.) If the condition is subsequent the prior bequest becomes absolute.

And by the rules of the Roman Civil Law, and the analogous rules of the English Law derived therefrom, restraints on the freedom of marriage are so odious, that

(a.) If the condition is *subsequent*, expressly or impliedly providing for the ceasing of the interest in the event of marriage, then, even although the restraint is partial only,—

(aa.) If there is no bequest over in the event of marriage, the prior bequest is absolute; but

(bb.) If there is a bequest over in the event of marriage, the prior bequest becomes divested in the event of marriage, and the property passes to the second legatee.

On the other hand,

(b.) If the condition is *precedent*, then, even although the restraint is partial only,—

(aa.) If there is no bequest over in the event of marriage, the legacy is forfeited (*Young v. Furze*, 8 De G. M. & G. 756;

CONDITIONS PRECEDENT AND SUBSEQUENT—continued.

sed dubitatur, see 2 Jarm. Wills, 2nd ed. 37); and

(bb.) If there is a bequest over in the event of marriage, the prior legacy is forfeited, and passes over to the second.

CONDITIONS REPUGNANT. It is a well established rule of Law, that conditions or restraints inconsistent with, or repugnant to, the estate or interest to which they are annexed, are absolutely void. Numerous illustrations of the rule are furnished in the reported decisions. Thus (1.) The power of alienation being an incident inseparable from an estate in fee simple, it follows that any condition against alienation annexed to a conveyance or devise to any one in fee simple is absolutely void, whether the condition be general, *i.e.*, forbidding alienation altogether (Co. Litt. 206 b, 223 a), or be particular, *i.e.*, forbidding alienation in certain specified modes, *e.g.*, by mortgage; and it makes no difference if there be a forfeiture or executory devise over in case of an attempt at alienation (*Ware v. Cann*, 10 B. & C. 433). The rule is the same, in the case of a gift in fee tail with a condition annexed to it not to suffer a common recovery or fine, or execute any other disentailing assurance (*Piers v. Winn*, 1 Vent. 321). Also, in *Bradley v. Peizoto* (3 Ves. 324), in the case of a bequest to A. for life, and at his decease to his executors and administrators, it was held that A. took an absolute interest in the legacy, and that a condition restraining him from disposing of the principal of the legacy, followed by a gift over in case he should attempt to do so, was inconsistent with the previous absolute bequest, and was therefore altogether void.

Again (2.) In the case of a devise in fee, with a condition that no wife should have dower or husband curtesy out of the estate devised, the condition would be void for repugnancy.

Again (3.) In the case of a feoffment in fee, with a condition excluding females from ever taking the inheritance, the condition would be void for repugnancy.

Again (4.) In the case of a gift in fee to A., with a condition that failing disposition thereof by A. in his lifetime (*Ross v. Ross*, 1 J. & W. 154), or so far as such disposition should not extend (*Watkins v. Williams*, 3 Mac. & G. 622), the undisposed of principal should devolve in a certain specified way, the condition was held void for repugnancy, it being an inconsistent thing to separate the devolution of property from the property itself.

CONDITIONS REPUGNANT—continued.

Again, (5.), In the case of an absolute bequest or devise, or other gift to A., with a condition that the property given should not be liable to the debts of A., the condition would be void for repugnancy. *Rochford v. Hackman*, 9 Hare, 475.

Again, (6.), In the case even of a life or other limited interest being given to A., with a condition that he is not to anticipate the same, the condition would be void for repugnancy (*Brundon v. Robinson*, 18 Ves. 429); for property cannot be given for life any more than in fee simple, without the power of alienation being incident to the gift. And even in the case of a female, a married woman, such a restraint on anticipation is totally void for repugnancy, unless the married woman's interest is her own separate estate (see title SEPARATE ESTATE). Nevertheless a proviso determining a life interest in property upon the bankruptcy of the life-tenant, and carrying the property over has been held valid (*Lockyer v. Savage*, 2 Stra. 947); *a fortiori* such a proviso would be valid in case the bankruptcy occurred in the lifetime of the testator (*Yarnold v. Moorhouse*, 1 Russ. & Mv. 364), or settlor (*Manning v. Chambers*, 1 De G. & Sm. 282).

But while avoiding in that manner all general restraints and all conditions which are contradictory to the inherent essence of the gift, the law nevertheless, not only permits, but favours, partial or limited restraints. For example, the following limited restraints on alienation, and others like them, are valid in law:—

- (1.) A condition not to alien in mortmain, or to A. or B. in particular; and
- (2.) A condition not to alien within a limited time.

On the other hand, a condition not to alien excepting to one specified individual would be void, as being virtually an unlimited or general restraint. *Attwater v. Attwater*, 18 Beav. 330.

CONDITIONS, VOID. Generally, all conditions that are repugnant to, or inconsistent with, the nature of the grant, or gift, to which they are annexed are void. See title CONDITIONS REPUGNANT.

Similarly, conditions in restraint of the cohabitation of man and wife (*Wren v. Bradley*, 2 De G. & Sm. 49), and provisions having reference to the future separation of man and wife (*Cartwright v. Cartwright*, 3 De G. M. & G. 982; *Cocksedge v. Cocksedge*, 14 Sim. 244), are void as being contrary to public policy; and so also, and for the like reason, are conditions in general restraint of trade: See title CONTRACTS IN RESTRAINT OF TRADE.

CONDITIONS VOID—continued.

Similarly repugnant conditions are void, as being contrary to plain common sense, which is the spirit and essence of the Common Law: See title REPUGNANT CONDITIONS. Similarly, conditions for the cesser of an estate or interest in real or personal property upon alienation or bankruptcy, are void, unless in exceptional cases: See title CONDITIONS REPUGNANT. Again, impossible conditions are in general void: See title IMPOSSIBLE CONDITIONS. And with reference to the validity of conditions not to dispute a will, see title WILL.

CONDITIONAL LIMITATIONS. These consist in the original limitations or definitions of an estate, and not in the determination or destruction by means of a condition of an estate previously limited. They apply both to real estate and to personal estate.

(1.) With reference to real estate. If real estate is given to a woman for widowhood (*durante viduitate*), such a limitation is good, even if it be not followed by any limitation over on her re-marriage, and *a fortiori* if it be followed by such latter limitation; and if real estate is given to a woman as long as she shall remain unmarried (*dum sola fuerit*), such a limitation is good (Co. Litt. 42 a); although, as being (in appearance at least), in general restraint of marriage, it would be void as a condition subsequent whether followed or not by a limitation over.

(2.) With reference to personal estate. The authorities are in favour of the validity of such limitations until marriage (see *Webb v. Grace*, 2 Phil. 702; *Heath v. Lewis*, 2 De G. M. & G. 954; *Morley v. Rennoldson*, 2 Hare, 579); from which cases it is necessary to distinguish *Wren v. Bradley* (2 De G. & Sm. 49), as not being a case of conditional limitation, but of void condition subsequent.

Period to which death when mentioned in conditional language is to be referred.

(1.) With reference to personal estate.

(a.) When personal estate is given to A. absolutely or indefinitely, "and in case of his death," or "in the event of his death," to B., the testator, in the absence of evidence of a contrary intent, is taken to have intended death at some particular period (and not death generally), and therefore,

(aa.) When the interest given to A. is immediate, and there is no other period to which the death can be referred, the death is to be referred to some period in the lifetime of the testator (*Schenk v. Agnew*, 4 K. & J. 405); from which case are to be distinguished, *Lord Douglas v. Chalmer* (2 Ves. jun. 500) and cases of that class, in which upon the special circumstances the

CONDITIONAL LIMITATIONS—contd.

reference was held to be to death generally. The reference of the period of death to the lifetime of the testator is considered to be still more clear, when he uses these words, "and if he should die" or "and in case he should die."

(bb.) Where the interest given to A. is preceded by some particular interest given to another, the death is to be referred to some period in the lifetime of the latter (i.e. of the prior beneficiary*), and it is immaterial in this case whether or not the death of A. occur antecedently or subsequently to the death of the testator; and generally where any period other than the lifetime of the testator can be suggested, that period is to be preferred.

(b.) When personal estate is given to A. for life only and not absolutely, and "if he should die," or "in case he should die," or "in the event of his death," &c., to B., the death is not to be referred to any period in particular either in the lifetime of the testator or not, but is to be taken as referred to generally; and so also if only the interest or income of a fund is given to A. 2 Jarm. Wills, 2nd ed., 633.

(2.) With reference to real estate.

(a.) Where by a will executed before the Wills Act, 1 Vict. c. 26, real estate is given to A., and in case of his death to B.,

(aa.) If the words of reference to death are to death simply, then the reference is to death generally and not to any particular period either within the lifetime of the testator or not.

(bb.) If the words of reference to death are not to death simply, but to death under certain specified circumstances, then the reference may be to death generally, although attempts may be legitimately made in certain cases to shew that the reference is to some particular period suggested by the specified circumstances. 2 Jarm. Wills, 2nd ed., ch. 49.

(b.) Where by a will executed since the Wills Act, 1 Vict. c. 26, real estate is given to A., and in case of his death to B.,

(aa.) If the words of reference to death are to death simply, then the reference is to death within the lifetime of the testator, or, (if there should be any estate given to another which is prior to A.'s estate), then to death within the period of the lifetime of the prior beneficiary*, and it is immaterial in this case whether the death of A. occur antecedently or subsequently to the death of the testator.

(bb.) If the words of reference to death are not to death simply, but to death under certain specified circumstances, then the reference may be to death within the life-

* "Duration of the prior estate" might probably be the more correct expression.

CONDITIONAL LIMITATIONS—contd.

time of the testator, although attempts may be legitimately made in certain cases to shew that the reference is to some particular period suggested by the specified circumstances. 2 Jarm. Wills, 2nd ed., ch. 49.

CONDONATION. A technical term, formerly used in the Ecclesiastical Courts, and from them transferred to the Court for Divorce and Matrimonial Causes, to signify *forgiving* by a husband or wife of a breach, on the part of the other, of his or her marital duties. The legal effect of which forgiving, or *condonation*, is, that the party cannot subsequently seek redress for an offence already forgiven. For instance, if after his knowledge of the wife's adultery a husband cohabits with her, such an act of *condonation* bars him from his remedy of divorce; and a wife is equally barred who has condoned an act of cruelty on the part of the husband. It is an important exception, however, to the general doctrine of condonation, which is founded on a willingness to heal the disputes of married life, that a subsequent repetition of the crime revives the former offence, and nullifies the intermediate act of condonation by the injured party.

CONDUCT MONEY. Money paid to a witness who has been subpoenaed on a trial, sufficient to pay the reasonable expenses of going to, staying at, and returning from, the place of trial. These expenses are estimated according to the rank of life of the party, the state of his health at the time, and other similar circumstances. Lush's Pr. 460.

CONFERENCE. In reference to the proceedings of Parliament, is a meeting of the two Houses for the purpose of considering (or *conferring* upon) any point or measure on which they differ. It is conducted by a few members of each House, who are appointed as *managers of the conference*. The managers of both Houses assemble at a time and place appointed by the Lords (whose privilege this is), and usually one manager on each side states and argues the case for his own party. At all conferences the managers for the Upper House are seated, and wear their hats, while the Commons' managers stand uncovered. Frequently reasons in writing, in support of their own view, are furnished by one set of members to the other.

CONFESSION (*confessio*). This word, in the law, retains its usual and popular signification. Thus, when a prisoner is indicted of treason, and brought to the bar to be arraigned, and the indictment being read to him, and the Court demanding

CONFESSION—*continued.*

what he can say thereto, he *confesses* the offence and indictment to be true, or pleads *not guilty*. The word *confession* is also used in civil matters, as where a defendant confesses the plaintiff's right of action by giving him a *cognovit*, &c.

See title COGNOVIT ACTIONEM.

CONFESSION AND AVOIDANCE. Pleadings in *confession and avoidance* are those in which the party pleading admits or confesses, to some extent at least, the truth of the allegation he proposes to answer, and then states matter to *avoid* the legal consequence which the other party has drawn from it. Of pleas of this nature, some are distinguished as pleas in *justification* or *excuse*, others as pleas in *discharge*. The former shew some justification or excuse of the matter charged in the declaration, the latter some discharge or release of that matter. The effect of the former, therefore, is to shew that the plaintiff never had any right of action, because the act charged was lawful; whilst the latter is to shew that, though he once had a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the *son assault demesne*, in an action of trespass for assault and battery (wherein the defendant alleges that the assault complained of was committed in self-defence against the attack of the plaintiff), is an instance; and a common example of those in discharge is, in an action of covenant, a plea of release, wherein the defendant alleges that the plaintiff had, after the breach, released him from all breaches, &c. This division applies to *pleas* only, and not to replications or subsequent pleadings. Stephen on Pl. 229.

See title COLOUR.

CONFISCATION. See title PRIZE.

CONFUSIO. In French Law (as in Roman Law), is the extinction of a debt by the *merger* of the persons of debtor and creditor in one and the same person.

See title MERGER.

CONJUGAL RIGHTS, RESTITUTION OF.

Under the stat. 20 & 21 Vict. c. 85, application for this purpose may be made to the Court by either husband or wife upon petition. The adultery of the wife is a bar to her obtaining restitution (*Hope v. Hope*, 1 S. & T. 94; but see *Leaver v. Leaver*, 2 S. & T. 665, Appx. 11). A deed of separation is no bar to a suit for restitution of conjugal rights (*Anquez v. Anquez*, L. R. 1 P. & M. 176). In case the decree is made, a time is fixed within which it must be complied with, in order that an attachment may issue after that

CONJUGAL RIGHTS, RESTITUTION OF

—*continued*

time in case it is not complied with. *Cherry v. Cherry*, 29 L. J. (Mat. Cas.) 441.

CONNIVANCE : See title DIVORCE.

CONSANGUINITY, or KINDRED. Relationship by *blood*, in contradistinction to *affinity*, which is relationship by *marriage*.

CONSCIENCE, COURTS OF. Courts of conscience, or, as they are otherwise called, *Courts of Request*, are Courts constituted by Acts of Parliament in the City of London and other commercial districts, for the recovery of small debts. They are constituted of two aldermen and four common councilmen, who sit twice a week to hear all causes of debt not exceeding the value of forty shillings, which they examine in a summary way, by the oath of the parties or other witnesses, and make such order therein as is consonant to equity and good conscience.

CONSEIL DE FAMILLE. In French Law, certain acts require the sanction of this body. For example, a guardian can neither accept nor reject an inheritance to which the minor has succeeded without its authority (Code Nap. 461); nor can he accept for the child a gift *inter vivos* without the like authority (Code Nap. 463). So also, in bringing or compromising a suit on behalf of the child, or generally in compounding claims, and in numerous personal relations, *e.g.*, consent to marriages of orphans, the authority of this body is necessary.

CONSEIL JUDICIAIRE. In French Law, when a person has been subjected to an interdiction on the ground of his insane extravagance, but the interdiction is not absolute, but limited only, the Court of first instance which grants the interdiction, appoints a council, with whose assistance the party may bring or defend actions, or compromise same, alienate his estate, make or incur loans, and the like.

CONSENT OF THE CROWN. In cases where the proceedings of Parliament may interfere with the rights or prerogatives of the Crown, by the provision of any particular bill introduced into any branch of the Legislature, it is necessary to obtain the consent of the Crown before such bill can pass through any of its stages.

CONSEQUENTIAL DAMAGES : See title DAMAGES, SPECIAL.

CONSIDERATION. This is one of the three particular requisites, or essentials, to a simple contract. It is not necessary in the case of a contract of record, or by specialty.

See title CONTRACT

CONSISTORY (*consistorium*). Nearly the same meaning as *praetorium*, or tribunal. The *Consistory Court* of every diocesan bishop is held in their several cathedrals for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor or his commissary is the judge, and from his sentence an appeal lies by virtue of the same statute to the archbishop of each province respectively, or to the Dean of Arches, as his officer.

See title **OFFICIAL PRINCIPAL**.

CONSOLIDATION RULE. If several actions between the same parties (or parties having the identical interests) are pending in the same cause (or cause which is substantially the same), the Court may stay the proceedings in all but one, and require the others to follow the event of the one. Similarly, if one plaintiff brings several actions against the same defendant in respect of matters which he might have united in one action, the Court will require him to consolidate them. 2 Arch. Pract. 1357.

CONSPIRACY. This is a criminal offence of the degree of a misdemeanour, and is punishable with fine or imprisonment, or both. It is defined as an agreement between two or more persons,—(1.) Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; or, (2.) Wrongfully to injure or prejudice a third person, or any body of men, in any other manner; or, (3.) To commit any offence punishable by law; or, (4.) To do any act with intent to prevent the course of justice; or, (5.) To effect a legal purpose with a corrupt intent, or by improper means.

CONSTABLE. The word constable has been said to be derived from the Saxon language, and to signify the support of the king; but others have, with greater reason, supposed it to be derived from the Latin *comes stabuli*, an officer who among the Romans used to regulate all matters of chivalry, tilts, tournaments, and feats of arms, &c. The *Constable of England*, or *Lord High Constable*, as he was called, was an officer of high dignity and importance in this realm about the time of Henry VIII.; but since that period the office has been disused in England, except on great and solemn occasions. He was then the leader of the king's armies, and had the cognizance of all matters connected with arms and war. He also sometimes exercised judicial functions in the Court of Chivalry, where he took precedence of the earl marshal. His jurisdiction is partly now vested

CONSTABLE—*continued*.

in the Court of Admiralty. The constables, however, to which we more immediately refer now are of two sorts, *high constables* and *petty constables*; the former are appointed at the Court leets of the franchise or hundreds over which they preside, or in default of that, by the justices at the quarter sessions, and are removable by the same authority that appoints them. They have the superintendence and direction of all petty constables within their district, and are in some measure responsible for the conduct of these latter. They have also the surveying of bridges, the issuing of precepts concerning the appointment of overseers of the poor, of surveyors of the highways, of assessors and collectors of taxes, &c. The duties of petty constables are subordinate to those of the high constable, and of a less important character. There are also *Constables of Castles*, who are governors or keepers of the same, and whose office is usually honorary.

See also titles **ARREST**; **POLICEMAN**; **WARRANT**.

CONSTITUTION, CHARACTER OF ENGLISH. According to Sir John Fortescue (who was tutor to Henry VI.), the English Government is political and not regal, that is, limited and not absolute. Even the King's prerogatives are given to him only for the subject's good. According to Mr. Hume, on the other hand, the Government of England, in its earlier periods, was most arbitrary and absolute.

Certain it is that the prerogative of purveyance, as regards both articles of consumption and labour, had been commuted into a right of pre-emption at a reasonable price; that in judicial matters, torture was unrecognised by the law, although occasionally resorted to in fact; that the rights of juries were respected by the Courts of Law, although sometimes evaded; and that illegal condemnations upon political charges were infrequent. Therefore England, compared with other countries, was more nearly what Fortescue says than Hume; and Hallam supports Fortescue's opinion. Hallam, moreover, attributes this general character of the English constitution to the four following causes, namely:—

- (1.) The civil equality of all freemen below the rank of the peerage;
- (2.) The subjection of the peers themselves to the impartial arm of justice and taxation;
- (3.) The passion of the early kings for continental conquest, whereby they were constantly in want of money; and
- (4.) The vigour of the first three Norman sovereigns, who effectually repressed the principles of insubor-

CONSTITUTION, CHARACTER OF ENGLISH—continued.

dination and resistance, which were natural to feudalism.

At the same time there is some justification for Hume's opinion, in the frequent interferences of the King's Privy Council in matters affecting the liberties and properties of the subject; also in the fact that the constable and the marshal exercised a large jurisdiction, which was most arbitrary; also in the circumstance that the feudal rights of the Crown, namely, wardships, escheats, and forfeitures were exercised unsparingly; also, lastly, in the circumstance that the forest jurisdictions, although nominally abridged by the *Charta di Foresta*, were still extensive and encroaching. It may, therefore, be concluded that Fortescue's opinion is more flattering than true, and that Hume's opinion is slightly overdrawn the other way.

CONSTITUTION, GROWTH OF. The English constitution, unlike the American one, was not made, but grew; and the following stages in its growth are roughly distinguishable:—

(1.) The reign of Henry III., in which three points were established, namely—

- (a.) The Commons' right to participate in taxation;
- (b.) The Commons' right to participate in legislation; and
- (c.) The Commons' right to control the application of supplies.

(2.) The reign of Edward III., in which three points were established, namely—

- (a.) The Commons' right to participate in taxation;
- (b.) The Commons' right to participate in legislation; and
- (c.) The Commons' right to inquire into public abuses, and to impeach public ministers;

(3.) The reigns of Henry IV., V., and VI. (Lancastrian line), in which seven points were established, namely—

- (a.) The Commons' exclusive right in matters of taxation;
- (b.) The Commons' right to appropriate the supplies;
- (c.) The Commons' right to make grants of supplies conditional upon redress of grievances;
- (d.) The Commons' right to participate in legislation;
- (e.) The Commons' right to control the administration;
- (f.) The Commons' right to impeach public ministers; and
- (g.) The Commons' rights of privilege, namely—

- (aa.) Freedom of speech in Parliament;

CONSTITUTION, GROWTH OF—contd.

(bb.) Freedom from arrest during Parliament;

(cc.) Right of decision upon election returns.

CONSUL. This is an officer of a commercial character, appointed by the different states to watch over the mercantile interests of the appointing state, and of its subjects in foreign countries. There are usually a number of consuls in every maritime country, and they are usually subject to a chief consul, who is called the consul-general. A consul is not a public minister, nor entitled to the immunities of such; but in the absence of an ambassador or *chargé d'affaires*, a consul-general may act as temporary minister, and as such, *semble*, he is entitled for the time to these immunities, and to that position. Tuson on Consuls.

CONSULTATION (*consultatio*). When a party to a suit in one of the inferior Courts has obtained a writ of prohibition from one of the superior Courts from proceeding further in the matter, and if such superior Court shall finally, after demurrer and argument, be of opinion that there was no competent ground for having so restrained such inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the superior Court, and a writ of consultation shall be awarded; so called because, upon consultation and deliberation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction to be there determined in the inferior Court.

CONTEMPT OF COURT. This consists in any refusal to obey an order or process of the Court, or in offending against particular statutes, the contravention of which is thereby declared to be a contempt of Court; or in interfering with and violating the known and well-ascertained rules of the Court, e.g., of the Court of Chancery, regarding the custody or marriage of its wards; and also in certain offences of a vague kind, but which are generally calculated to prejudice the Court in its trial of the action, or in the regard of the people for it. See the true nature of the offence stated in the *Queen v. Castro* (L. R. 9 Q. B. 219). Every Court has, subject to the control of the Court of Queen's Bench, inherent power to punish for a contempt of Court, by whomsoever committed, and the offender may be committed without warrant. *In re Wilson*, 7 Q. B. 984.

CONTENTMENT. This word will be better understood by giving an example of its use, than by attempting to define it,

CONTENTEMENT—*continued.*

especially as writers are not agreed upon the meaning of the word. "No man shall have a larger amercement imposed upon him than his circumstances or personal estate will bear: saving to the landholder his *contentement*, or land; to the trader his merchandize, and to the countryman his wainage, or team, and instruments of husbandry." It would appear from the above that the word *contentement* signifies means of support, *i.e.*, the lands, tenements, and appurtenances are the same to the landholder as the merchandize is to the merchant, or his wainage to the waggoner. Blount; Spelm.

CONTENTIOUS JURISDICTION. The litigious proceedings in Ecclesiastical Courts are sometimes said to belong to its *contentious* jurisdiction, in contradistinction to what is called its voluntary jurisdiction, which is exercised in the granting of licences, probates of wills, dispensations, faculties, &c. See also Tristram's book on the Court of Probate, which is subdivided into the Non-contentious and the Contentious Jurisdictions of the Court.

CONTINUANCE. Anciently the parties to an action, or their attorneys for them, used to appear in open Court; the plaintiff's advocate stated his cause of complaint *vis à vis* the defendant's advocate his ground of defence; plaintiff's advocate replied; and the altercation continued till the two parties came to contradict one another, or, as it was termed, to an *issue*. If this issue was upon a point of law, the judges decided it; if upon a point of fact, it was tried by a jury, or by one of the other modes which prevailed at that period. While this was going on the officers of the Court, who sat at the feet of the judges, took a written minute of the proceedings on a parchment roll, which was called *the record*, and was preserved as the official history of the suit, and that alone, the correctness of which could be afterwards recognised and depended on, was the only evidence of the matters stated there, and the Court would not allow it to be contradicted. As the proceedings generally occupied more days than one, the Court used to adjourn them from time to time; if these adjournments, which were called *continuances*, were not made, the suit was at an end, since there was no period at which either party had a right again to call the Court's attention to it; and if the *continuance*, though made, were not entered on the record, the suit was equally at an end, since the record was the only evidence the Court would admit of the fact of the continuance. In such a case the action was said to be *discontinued*. And latterly when a cause was put down

CONTINUANCE—*continued.*

in the list of causes to be tried at a certain time, and from some cause or other it was not then tried, but was adjourned, a minute of such adjournment was entered on the record, which was technically termed entering a *continuance*, because such entry signified that the cause was not yet finished, but continued pending. This practice of entering continuances was, however, abolished by r. 31, T. T., 1853.

CONTINUANDO (*by continuing*). In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege the injury to have been committed by *continuation* from one given day to another, which is called laying the action with a *continuando*, and the plaintiff shall not then be compelled to bring separate actions for every day's separate injury. 2 Roll. Abr. 545.

CONTRAINTE PAR CORPS. In French law, is the civil process of *arrest* of the person, which is imposed upon vendors falsely representing their property to be unincumbered, or upon persons mortgaging property which they are aware does not belong to them, and in other cases of a moral heinousness.

CONTRACTS. There are three classes of contracts:—

- (1.) Record.
- (2.) Specialty.
- (3.) Simple.

I. Contracts of record, which are really only judgments, possess the following characteristics:—

- (1.) They merge all other contracts or grounds of action
- (2.) They have the effect of an *estoppel*;
- (3.) They require no *consideration*; and,
- (4.) They used to bind the land of the judgment debtor, but since 1864 they do not.

II. Specialty contracts, which are really only agreements by deed, possess the following characteristics:—

- (1.) They merge all simple contracts or other grounds of action;
- (2.) They have the effect of an *estoppel*;
- (3.) They require no consideration; and
- (4.) They may be made to bind the land by binding the heir.

Specialty contracts, although they estop the parties, may be avoided on the ground of fraud or illegality: thus in *Collins v. Blanton* (2 Wils. 341) the defendant had covenanted by deed to pay the plaintiff £700, and having refused to do so the plaintiff sued him upon the covenant; the defendant pleaded that the bond was given

CONTRACTS—continued.

as part of a scheme for stifling a criminal prosecution; this plea was held to be a good defence.

Specialty contracts may be discharged in two ways—

- (1.) By performance;
- (2.) By another specialty substituted for them, but not by any mere simple contract.

Thus: if a man has covenanted to repair or to build a house he can only be discharged by doing the thing, or else by another deed releasing him. This rule is without exception where the covenant has not yet been broken (*i.e.*, before breach of covenant), but after breach there is one exception, and that is where an uncertain sum of money is to be got as damages for the breach. *Blake's Case*. 6 Rep. 43 b.

III. Simple contracts. To every simple contract there are the three following general or abstract requisites:—

- (1.) Certainty in the terms of the contract;
- (2.) Assent of both parties to it (*assensus ad idem*); and
- (3.) Mutuality of obligation.

To every simple contract there are also the three following particular requisites:—

- (1.) Request;
- (2.) Consideration; and
- (3.) Promise.

Whence the following distinction, viz.:—

I. Where the consideration is *executory*, *i.e.*, in the case of *executory* contracts, the request and also the promise are *implied* by law, although, of course, both or either of them may be *express*.

II. Where the consideration is *executed*, *i.e.*, in the case of *executed* contracts,—

There are two classes of cases, viz.:—

- (1.) The acceptance of an executed consideration which was not moved by a previous request; and
 - (2.) A consideration executed on request.
- As to the former of these two subdivisions, the former is invariably obligatory (*see* title RATIFICATION); but as to the second subdivision, the following varieties present themselves, viz.:—

- (a.) Where the plaintiff has been *legally compelled* to pay what the defendant was *legally compellable* to pay, *e.g.*, A. was surety for B. for £500 owing by B. to C.; C. compelled A. to pay; then A. brought his action against B. to be repaid. Here the request and the promise are both *implied* in law;

- (b.) When the plaintiff has *voluntarily* paid what the defendant was *legally compellable* to pay, and the defendant afterwards *promises* to repay the plaintiff, *e.g.*, A. owes B. £50, and C., to oblige A., pays

CONTRACTS—continued.

the £50 to B. for him, then A. promises to repay C. Here the request to pay is implied in law, but the promise is not; and

- (c.) When the plaintiff has *voluntarily* paid what the defendant was *morally*, but not *legally* compellable to pay, *e.g.*, A. owes B. £50 on an immoral debt, and C., to oblige A., pays it; then A. afterwards promises to repay C. Here the request to pay is not implied, and the promise to repay is without a legal consideration.

In every contract *privity* is an essential requisite to any one suing on it; in other words, no person can take advantage of the consideration in a contract excepting the party from whom the consideration has moved, which means that no person can sue on a contract excepting the parties to it; and this is what is understood by *privity*. An example of the absence of *privity* is the following:—A. gives £50 to his servant to pay a tradesman's debt; the tradesman knowing of it sues the servant for money had and received to the tradesman's use (*Baron v. Husband*, 4 B. & Ad. 611); in this case the tradesman lost his action for want of *privity* between him and the servant.

CONTRACTS IN RESTRAINT OF TRADE. All such contracts as a general rule are void, because they are against public policy (*Mitchel v. Reynolds* 1 Sm. L. C. 356). But such contracts are allowed to be good where the restraint is limited to a particular time, or to a particular locality, and when a valuable consideration has been given for them.

The requisites to a valid contract in restraint of trade are two, viz.:—

- (1.) That the restraint be limited either in time or in locality, or in both; and
- (2.) That a valuable consideration should have been paid for the restraint.

What shall be reasonable in point of time or locality varies with the nature of the business.

And generally, the restraint is only allowed so far as is necessary to protect the trader.

CONTRAT. In French Law, contracts are of the following varieties:—

- (1.) *Bilateral*, or *synallagmatique*, where each party is bound to the other to do what is just and proper; or
- (2.) *Unilateral*, where the one side only is bound; or
- (3.) *Commutatif*, where one does to the other something which is sup-

CONTRAT—continued.

- posed to be an equivalent for what the other does to him; or
- (4.) *Aléatoire*, where the consideration for the act of the one is a mere chance; or
 - (5.) *Contrat de bienfaisance*, where the one party procures to the other a purely gratuitous benefit; or
 - (6.) *Contrat à titre onéreux*, where each party is bound under some duty to the other.

CONTRIBUTION. It is a rule of law, that all persons in the nature of co-sureties for the debt of another shall directly (as in Roman Law) or indirectly (as in English Law) bear their proper share of the liability, so far as regards the mutual relief of each other, and depend for their individual reimbursement upon their action against the principal debtor. The remedy of a co-surety against his co-surety is said to be for *Contribution*; that against the principal debtor is said to be for *Re-roupment* (see title SURETY). It is likewise a rule of law, that there is no contribution between wrongdoers. *Merryweather v. Nizan*, 8 T. R. 186.

CONVENTICLE ACT: See title STATUTES ECCLESIASTICAL.

CONVENTION. The most general name for agreement.

CONVENTION PARLIAMENT, ACTS OF. The matters to be provided for by this parliament (which assembled in 1660) were the following:—

- (1.) An indemnity for the past;
- (2.) The restoration of the church;
- (3.) The settlement of the revenue; and
- (4.) The repeal of the late obnoxious statutes.

With reference to the first of these four matters, Charles II., by his declaration from Breda, had offered an indemnity to all persons who had been concerned in the late irregular proceedings, with the exception only of his father's regicides; and this promised indemnity was endeavoured to be secured by "The Act of Indemnity and Oblivion," which Act excepted, however, not only those who had signed the death-warrant against Charles I., but also all those who had sat when sentence was pronounced against that king, together with several others.

With reference to the second of these four matters, Episcopalianism was restored as the national religion, and with it the bishops were reinstated in the House of Lords. The lands, also, of the church, which had been confiscated, and some of them even sold to purchasers from the state, were also restored to the church, and

CONVENTION PARLIAMENT, ACTS OF—continued.

no compensation given to the purchasers who were deprived of them. The dispossessed clergy who survived at the Restoration were restored to their former livings or to fresh benefices, so far as such restoration could be carried out without dispossession of the then existing incumbents, who were allowed to remain in possession if willing to conform.

With reference to the third of these four matters, military tenures were abolished, and with them the revenue derived by the Crown from aids, wardships, &c.; and, in lieu thereof the excise was given to the crown.

With reference to the fourth of these four matters, the militia was replaced under the sole command of the king; the Triennial Act of 1641 was repealed; and the following Acts of an ecclesiastical character were passed:—The Corporation Act, the Act of Uniformity, the Act against Convicticles, and the Five Mile Act.

CONVENTUAL CHURCH. A church consisting of regular clerks professing some order of religion, or of a dean and chapter, or other such society of ecclesiastics. Cowel.

CONVERSION. This word has two significations in law. (1.) In the action of trover, in which it is the gist of that action, it denotes the appropriating by the defendant to his own use of the goods of the plaintiff, in a manner short of criminal; the appropriation consisting substantially in the negative act of withholding them from the plaintiff, upon his demand; (2.) In Equity it denotes the notional alteration of land into money, or of money into land, in accordance with a direction to that effect of a testator or settlor, and in pursuance of the equitable doctrine that what is agreed or imperatively directed to be done is already done, or as good as done. As a consequence of this doctrine, it has been held—

(1.) That lands directed to be converted into money for certain purposes, some of which fail, descend, in the case of the direction being contained in a will, to the heir-at-law of the testator (*Ackroyd v. Smithson*, 1 Bro. C. C. 503); and, in case of his death, to his next of kin (*Smith v. Claxton*, 4 Maddox, 492); but that, in the case of the direction being contained in a deed, the rule is just the reverse; and

(2.) That money directed to be converted into land for certain purposes, some of which fail, goes, in the case of the direction being contained in a will, to the executor of the testator (*Cogan v. Stevens*, 1 Beav. 492, n.); and, in the case of his death, to his executor (*Reynolds v. Godlee*, G 2

CONVERSION—*continued.*

1 Johns. 536); but that, in the case of the direction being contained in a deed, the rule is just the reverse.

Where the purposes for which the conversion was to take place *totally* fail, the property is regarded as being what it actually is, and the doctrine of conversion is in that case excluded.

See also title **RECONVERSION**.

CONVEYANCES. These, which anciently were called *Assurances*, are instruments under seal, whereby lands are conveyed or assured from the vendor to the vendee, so as to vest in the latter such an estate as the vendor has in himself to convey or assure, and as the words of limitation in the deed limit or mark out.

Conveyances arrange themselves under two great classes, viz.,—

I. Conveyances at the Common Law, and hereunder,—

- (1.) Feoffments;
- (2.) Gifts;
- (3.) Grants;
- (4.) Bargains and sales;
- (5.) Leases;
- (6.) Exchanges;
- (7.) Partitions;
- (8.) Releases;
- (9.) Confirmations;
- (10.) Surrenders;
- (11.) Assignments;
- (12.) Defeasances; and
- (13.) Disclaimers.

II. Statutory Conveyances, and hereunder,—

A. Conveyances operating under the Statute of Uses, and hereunder,—

- (1.) Covenants to stand seised;
- (2.) Deeds of lease and release;
- (3.) Deeds leading or declaring the uses;
- (4.) Deeds of revocation of uses;
- (5.) Deeds of appointment under powers; and generally
- (6.) Any Common Law conveyance made to uses.

B. Conveyances under statutes other than the Statute of Uses, and hereunder,—

- (1.) Release under 4 Vict. c. 21;
- (2.) Grant under 8 & 9 Vict. c. 106;
- (3.) Disentailing assurances under 3 & 4 Will. 4, c. 74;
- (4.) Assurances of married women under 3 & 4 Will. 4, c. 74; and
- (5.) Conveyances and leases (concise forms) under 8 & 9 Vict. c. 119, and other subsequent statutes.

Again, of deeds which operate under the Statute of Uses, there is this further division, namely,—

CONVEYANCES—*continued.*

I. Deeds operating without transmutation of possession, and hereunder,—

(1.) Bargain and sale;

(2.) Covenant to stand seised, &c., the statute itself effecting the alteration in the legal seisin; and

II. Deeds operating with transmutation of possession, and hereunder,—

(1.) Deeds leading or declaring the uses;

(2.) Feoffment to uses, &c., the legal seisin being first transferred by a Common Law assurance before the statute operates to effect a second transfer.

I. Conveyances at Common Law, and hereunder the following,—

(1.) *Feoffment.* This was the most ancient form of conveyance applicable to corporeal hereditaments. It consisted of two parts, viz.,—

(a.) The limitation of the estate intended for the feoffee; and

(b.) The livery of seisin.

First. The limitation of the estate. This consisted in defining by the customary words of limitation the estate which was intended to be given to the feoffee. Originally, it sufficed to pronounce these solemn words *orally* in the presence and hearing of witnesses and of the feoffee; and although a deed or writing may have been (as in fact it was) occasionally used for that purpose, the same was unnecessary. However, by the stat. 29 Car. 2, c. 5 (Statute of Frauds), s. 1, it was enacted that all leases, estates, interests of freehold or term of years, or any uncertain interest in messuages, manors, lands, tenements or hereditaments, made or created by livery of seisin only, or by parol, and *not put in writing* and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized in writing, should have the force and effect of leases or estates at will only, and no greater force and effect; the only exception being that leases for a term not exceeding three years from the making thereof were to be good, although made by parol without writing, provided they reserved a rent of two-thirds at least of the full improved value. And now, by the stat. 8 & 9 Vict. c. 106, s. 3, it is enacted that no feoffment other than a feoffment made under a custom by an infant, shall be valid unless made by deed. So powerful was the efficacy of the feoffment that it frequently operated by wrong, whence also it was called a *tortious* conveyance, passing to the feoffee the full estate marked out by the words of limitation, although that should be in excess of the estate which the feoffor had in himself to grant. But by the stat. 8 & 9 Vict. c. 106, s. 3, the feoffment was deprived of this tortious effect, and was reduced to the

CONVEYANCES—continued.

level of an *innocent* conveyance. Even feoffments made by idiots and lunatics were valid until the same were avoided, which might never be; and an infant's feoffment of gavelkind lands is absolutely valid, provided he be of the age of fifteen years.

Secondly, the livery of seisin. The seisin was the feudal possession; and a transfer of the land accompanied with seisin was the transfer of an estate carrying the seisin with it. Livery of seisin was of two kinds,—either

(1.) Livery in deed; or

(2.) Livery in law. *See* these titles.

No deed of feoffment was complete, or to the present day is complete, unless the same has been followed with livery of seisin; and as a convenient mode of evidencing the fact of such livery having been made, it is usual to indorse upon the deed which contains the limitations a notice to the effect that the seisin was delivered at a certain place, day, and hour.

The feoffment, strictly speaking, was the proper form of conveyance of an estate in fee simple absolute or determinable; if it was used to pass a fee tail, it was more properly termed a gift (*see* that title), and if it was used to pass a life estate, it was more properly termed a lease (*see* that title.)

When a particular estate, whether for years or of freehold, and a freehold remainder are created together *de novo* out of a corporeal hereditament in possession, the livery which is given to the tenant of the particular estate in possession enures to the remainderman; on the other hand, when an estate is created afterwards, expectant on a lease for years then in being, the livery must not be made to the lessee for years, but to the remainderman himself with the consent of the lessee for years. Of course, no such remainder created afterwards can be expectant on a lease for life, or estate of freehold.

The feoffment was a conveyance of very powerful efficacy. Thus, by reason of the entry and livery of seisin, it clears all disseisins, abatements, intrusions, and other wrongful or defeasible estates, when the entry of the feoffor is lawful; and it not only passes the present estate of the feoffor, but bars him of all present and future right and possibility of right to the thing which is so conveyed; insomuch that if he has divers estates all of them pass by the feoffment, and if he has any interest, rent, common, condition, power, or contingent use or benefit in, to, or out of the land, it is extinguished by the feoffment; and the feoffment destroys also all contingent remainders in strangers, if supported only by an estate of freehold in the feoffor. And prior to the Act 8 & 9 Vict. c. 106, s. 4, it

CONVEYANCES—continued.

had a tortious operation so as to pass even a larger estate than the feoffor had in him to pass.

(2.) *Gift*.—This was the form of conveyance properly applicable to an estate tail; whence the person creating the estate tail is termed the donor, and the person taking it the donee. It required livery of seisin to make it effectual.

(3.) *Grant*.—This was the distinctive mode of conveyance of an incorporeal hereditament, which however must have been in existence at the date of the grant, and not created by the grant.

(4.) *Bargain and Sale*.—This form of conveyance was applicable not only to corporeal but also to incorporeal hereditaments in actual existence. It required to be for money, or money's worth, and not for natural love and affection merely. All persons having an estate of freehold might convey by means of it, but not a mere term, or for years. The enrolment of a bargain and sale, if made within the proper time relates back to the execution of the deed, and any intervening alienation or charge by the bargainor would therefore be void, but such an alienation or charge by the bargainee would be good when the bargain and sale was afterwards perfected by enrolment. Enrolment was first rendered necessary by the Statute of Inrolments (27 Hen. 8, c. 16), but only when the bargain and sale was for an estate of freehold.

(5.) *Lease*, including *Underlease*.—A lease is properly a conveyance (subject to rent) of lands or tenements made for life, for years, or at will, but always for a less estate than the lessor has in the premises; and similarly an underlease is a lease made by the lessee for a less period than the period of his own lease.

Sometimes, what purports in its language to be only an agreement for a lease is, in reality, an actual lease; for if there are words of present demise and an apparent intent to the effect of these words, then the deed is an actual lease, notwithstanding the words are "agrees to let," and allusion is made to a lease to be executed at some future date. *Poole v. Bentley*, 12 East, 168; *Doe d. Phillip v. Benjamin*, 9 Ad. & El. 644.

By the Common Law, a tenant for life (except under a power) cannot make a lease for a longer period than that of his own life; and a lease granted by him for a longer period is as to the excess absolutely void as against the remainderman or reversioner. When the tenant for life and the remainderman or reversioner unite in making a lease, the lease is considered during the life of the tenant for life as his lease, and as the confirmation thereof by

CONVEYANCES—continued.

the remainderman or reversioner, and after the death of the tenant for life as the lease of the remainderman or reversioner, and the confirmation of the tenant for life. See also title **MINISTERIAL POWERS OF TENANT FOR LIFE**.

By the Common Law, a tenant in tail could not, without a fine or recovery, make any lease binding on the issue in tail, or remainderman, or reversioner; and if a husband seised *jure uxoris* made a lease of the wife's land, whether she joined in it or not, the lease was only good during the joint lives of the husband and wife and the life of the husband surviving her, and was voidable (although not void) if the wife survived. But see title **MINISTERIAL POWERS OF TENANT IN TAIL**.

(6.) *Exchange*.—This is a conveyance, or group of conveyances whereby two persons or classes of persons holding property in common, divest themselves respectively of their estates in favour of the other person, or class, and in lieu thereof respectively take the property of the other. There are five requisites by the Common Law to the validity of an exchange, that is to say:

- (1.) The two properties must be of the same quality;
- (2.) The properties exchanged must be of the same quantity;
- (3.) The word "exchange" must be used;
- (4.) Entry is requisite, although not livery of seisin; and
- (5.) Writing since 29 Car. 2, c. 3, and a deed since 8 & 9 Vict. c. 106, s. 3.

The word "exchange" used to raise an implied warranty of title; and in case of the title being displaced either in whole or in part by an elder title, the exchanging party who was evicted used to have the right to re-enter upon the lands which he had given in exchange,—a right which belonged to himself and his heirs only, not also to his alienees. Any alienation by either exchanging person deprived him of the right of re-entering, although it left the other the right of re-entering upon the lands even when in the hands of the alienee. But since the stat. 8 & 9 Vict. c. 106, this effect has been taken from the exchange.

(7.) *Partition*.—This is a conveyance by which two or more joint tenants, co-parceners, tenants in common, or heirs in gavelkind, divide the property so as to give to each a distinct part, to be held in severalty. The arrangement to sever may be the result of agreement, in which case it is said to be *Voluntary*, or the result of a decree of the Court of Chancery, in which case it is said to be *Compulsory*. In either

CONVEYANCES—continued.

case, the same conveyances are necessary; and for facilitating the execution of which the Trustee Act, 1850, s. 30, enables the Court of Chancery to declare the interests of unborn persons, and also to declare any particular persons trustees of the lands. And by the stat. 31 & 32 Vict. c. 40, a sale may be directed in lieu of partition.

The modes of effecting a partition are the following:—

I. As to freeholds or inheritances: either

- (1.) All the co-tenants convey by separate deeds the particular allotments to releasees or grantees, to the use of the particular persons to whom they are respectively allotted; or,
- (2.) All the co-tenants convey by one conveyance, the entirety of the lands to a releasee, or grantee, to uses, and then by the same deed limit the particular allotments to the use of the particular persons to whom they are allotted.

II. As to personal estate: either

- (1.) The entirety is assigned by all the co-tenants to a third person upon trust, to assign the particular allotments to the particular persons to whom they are allotted; or,
- (2.) Each co-tenant assigns to the others his undivided share in the parts to be taken by them in severalty.

Co-parceners being compellable by the Common Law to make partition, the Law provided in their case (but not also in the cases of joint tenants and tenants in common), that if any co-parcener after partition and before alienation was evicted from the whole or from part of his or her allotted share, he or she might thereupon re-enter upon the other shares even when in the hands of an alienee or alienees of the other co-parceners. But by the 8 & 9 Vict. c. 106, s. 4, this right of re-entry is taken away.

(8.) *Release*.—This is a deed whereby either a right is extinguished, or an estate or interest in things real or personal is conveyed to a person who has already some estate or interest in possession in the same. When the release is the discharge of a sum due, e.g., for rent, it is called an *acquittance*. The operation of the release is fourfold: either

- (1.) By way of passing an estate (*mitter l'estate*), e.g., when made by one co-tenant to another; or
- (2.) By way of passing a right (*mitter le droit*), e.g., where the disseisee releases to the disseisor; or

CONVEYANCES—continued.

(3.) By way of extinguishment, *e.g.*, when the lord releases his seignior to the tenant; or

(4.) By way of enlargement, *e.g.*, where a remainderman or reversioner releases to the prior tenant of a particular estate, with whom he is in privity.

Besides express releases, or releases by deed, there are also releases in law; *e.g.*, a covenant never to sue amounts in construction of Law to an absolute release of the covenantee; also a release to one of several co-debtors, discharges them all both in Equity and at Law, and although they are severally as well as jointly bound; and a proviso that the co-debtor should not have any advantage from the release would be void for repugnancy. Similarly, a release of the right to land, if made to a tenant in tail or for life, enures to the remainderman or reversioner.

(9.) *Confirmation*.—This is a deed whereby a conditional or voidable estate is made absolute and unavoidable by the confirmor, or whereby a particular estate is increased. The confirmee must also have an estate and not a mere interest in the lands confirmed; also the contract or other instrument which is confirmed must be at the most voidable and not void. A confirmation to one joint tenant enures to the other or others; and a confirmation to a remainderman or reversioner enures to the owner of the prior particular estate.

(10.) *Surrender*.—This conveyance is the converse of the release which operates by way of enlargement; the effect of the surrender being the merger of the smaller estate in that of the surrenderee. A surrender may be either (a.) Express; or (b.) Implied in law; the former being in so many words, the latter arising in the following cases:—

(aa.) A lessee for an unexpired term, or for life, accepting a new lease for life or years from his lessor;

(bb.) A lessee being party to an act which is inconsistent with the continued existence of his estate, and which he is estopped from denying.

The estate of the surrenderor must be a *vested* estate; it must also be an estate which is capable of merger, and therefore it must not be an estate tail, nor of higher denomination than the estate of the surrenderee; there must also be a privity or contiguity between the estate of the surrenderor and that of the surrenderee.

(11.) *Assignment*.—This deed is the alienation by transfer of a personal chattel, or of a chattel interest in real estate. If it is for no consideration, it is a gift; if it

CONVEYANCES—continued.

is for value it is a bill of sale. Every assignment, if a gift, must be by deed; but if a bill of sale or transfer for value, it may, if a purely personal chattel, *e.g.*, a debt, be assigned at least in Equity, and since the Judicature Act, 1873, even at Law, by a simple writing, not necessarily a deed, although the assignment of chattels real must be by deed, 8 & 9 Vict. c. 106, s. 3. By the stat. 22 & 23 Vict. c. 35, s. 21, anyone may assign personal property including chattels real directly to himself and another person by the like means as he might have assigned to another only.

(12.) *Defeasance*.—This is a collateral deed, containing certain specified conditions upon which an interest created or transferred by another deed may be defeated. In the case of an estate of freehold and other executed estates, it must be made at the same time with the deed creating or transferring these estates; but in all other cases it may be made at any time subsequently to the deed of creation or transfer. A defeasance, excepting that it is contained in a separate deed, is in all other respects like a condition subsequent.

(13.) *Disclaimer*.—This is a deed whereby a grantee, devisee, or legatee renounces the grant, devise, or bequest, which renunciation he is competent to make at any time before he has done any act to shew his assent to the grant, devise, or bequest. If one or more joint tenants short of all disclaim, the entire estate or interest vests in the other or others; but if all disclaim, the estate will, if real estate, descend to the heir, and, if personal estate, will vest in the administrator when appointed.

II. Statutory Conveyances, and hereunder.

A. Conveyances under the Statute of Uses, and hereunder, the following:

(1.) *Covenant to stand seised*.—Whenever a covenant of this kind is entered into, if the consideration (which must be that of blood or natural affection) is sufficient, a use arises out of the seisin of the covenantor, and is immediately executed by the statute in the *cestui que use*, who thereby acquires the legal estate. The proper and technical words of this conveyance are, "Covenant to stand seised to the use of A.," &c., but any other words will have the same effect; *e.g.*, even the words "bargain and sale" (*Crossing v. Scudamore*, 1 Mod. 175; *Roe v. Trammar*, Willes, 632). The covenantor must, however, be a person who is capable of standing seised to a use; and the property conveyed must be such as admits of a person being seised thereof.

(2.) *Lease and Release*.—This, until the years 1841–5, was the most common form

CONVEYANCES—continued.

of conveyance under the Statute of Uses. The mode of its operation may be explained by three steps or by two:

(a.) By three steps, consisting successively of lease, entry, and release.

(b.) By two steps, consisting successively of bargain and sale, and release.

But whether explained in the one way or in the other, the manner of its operation was this: to create a tenant in possession for a year or term of years, and thereafter to release to him the reversion in fee simple. In this way, the tenant became seised of the legal estate in fee simple, and inasmuch as the uses were afterwards annexed to his seisin, he was called the "releasee to uses," and all covenants were entered into by and with him. But, otherwise, he was a mere conduit-pipe or channel, through which the legal estate passed into the first usee, who again was held to be a trustee for the second or last usee in the ordinary way.

(3.) *Deeds leading or declaring Uses.*—Where it was intended to levy a fine or suffer a common recovery, it was usual to execute a deed either previously or subsequently to the fine being levied or recovery suffered; and if executed previously, the deed was said to be one *leading* the uses, but if executed subsequently, it was said to be one *declaring* the uses.

(4.) *Appointment.*—This is a deed executed in virtue of a power of appointment. The power of appointment is conferred in these words: "To A. (the appointor) to such uses as he shall appoint;" and upon the grammatical construction of these words, it has been held that A.'s power is only over the uses. Consequently, if A. subsequently by deed or will appoints the lands to B. to the use of C., it is held that B. takes the legal estate under the Statute of Uses, and retains it as a trustee for C., who only takes the equitable estate. The power of appointment may be either general or special; and A.'s execution of it, if general, will date from the time of the actual execution, but if special, will date from the time of the execution of the instrument creating the power (if a deed), and of the death of the testator (if a will).

B. Conveyances under statutes other than the Statutes of Uses, and hereunder the following:

(1.) By the stat. 4 Vict. c. 21, s. 1, it is enacted that a deed of *release* of a freehold estate executed on or after the 15th of May, 1841, and expressed to be made in pursuance of that Act, shall be as effectual as a lease and release together would have been.

(2.) By the stat. 8 & 9 Vict. c. 106, s. 2, it is enacted that a deed of *grant* shall

CONVEYANCES—continued.

suffice for the conveyance of the immediate freehold of corporeal hereditaments.

(3.) By the stat. 3 & 4 Will. 4, c. 74 (Fines and Recoveries Abolition Act), s. 15, it is enacted

I. With regard to lands of freehold tenure.—That every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, may dispose of the entailed lands for an estate in fee simple absolute, or for any less estate, excepting, nevertheless, the following classes of tenants in tail, under ss. 16, 18, and 20, viz.:—

(aa.) Tenant in tail *ex provisione viri* under settlement dated on or before the 31st of December, 1833, excepting with the formalities required by the stat. 11 Hen. 7, c. 20;

(bb.) Tenant in tail restrained from such disposition by statute;

(cc.) Tenant in tail after possibility of issue extinct; and

(dd.) Tenant in tail in expectancy as being issue inheritable.

But in every such disposition, the consent of the protector, where there is any such, either by appointment of the settlor or under the Act, is requisite (ss. 34, 35) to enable the tenant in tail to create a fee simple absolute, or any estate larger than a base fee; and the protector in giving or in withholding such consent is to be subject to no control whatsoever, nor is he to be liable in respect of his exercise of his own discretion in the matter, s. 36. See title PROTECTOR.

By s. 40 of the same Act, every disposition by tenant in tail under the Act is to be made by deed, and not by contract or will; and the tenant in tail, if a married woman, is to procure her husband's concurrence in the deed, and is to acknowledge the same; and, in every case, the deed of disposition (not being a lease for or under twenty-one years, at or over five-sixths of a rack rent) is by s. 41 required to be enrolled in the Court of Chancery within six calendar months from the date of its execution; and by sect. 74 is to take effect upon such enrolment as from the date of its execution, excepting as against any intermediate purchaser for value.

By s. 38, a voidable estate created by a tenant in tail in favour of a purchaser is to be confirmed by a subsequent disposition of such tenant in tail, executed in accordance with the Act, but such confirmation is inoperative as against an intermediate purchaser for value without notice.

By s. 39, a base fee, when united with the immediate reversion, is to be considered as enlarged, and not as merged.

CONVEYANCES—continued.

II. With regard to lands of copyhold tenure.—That every actual tenant in tail,

- (a.) Whose estate is an estate at Law, may by *surrender* dispose of the entailed lands; and
- (b.) Whose estate is merely an estate in Equity, may either by *surrender* or by *deed* dispose of the entailed lands, s. 50.

The protector, if there be any such, either by appointment of the settlor, or in virtue of the Act, may signify his consent to such disposition either

- (1.) By *deed*, in which case he must produce the same to the steward of the manor for acknowledgment by the latter, and for entry by him on the Court rolls, s. 51; or
- (2.) By personal oral statement made to the steward, who shall in the memorandum of surrender to be entered on the Court rolls state that such consent was so given.

The deed of disposition, where that form and not a surrender is used, must be executed on or subsequently to the day of the date of the deed whereby the protector signifies his consent, when there is any such latter deed, s. 53; and the deed of disposition must also be entered on the Court rolls of the manor within six months after the execution thereof (*Honeywood v. Foster* (No. 1), 30 Beav. 1), but no other enrolment of it is necessary; nor is any other enrolment necessary of the memorandum of surrender (where that form and not a deed is used), save only on the Court rolls, s. 54.

III. With reference to *bankrupt tenants in tail*.—By s. 56, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, the commissioner in bankruptcy (and now the trustee in bankruptcy) may by deed, without the consent of the protector, dispose of the lands entailed to a purchaser for as large an estate as the actual tenant in tail, if not a bankrupt, could without such consent have disposed of the same; and by s. 57, in the case of a tenant in tail entitled to a base fee becoming bankrupt, the commissioner in bankruptcy (and now the trustee in bankruptcy) may, if there is no protector, dispose of the lands entailed to a purchaser for as large an estate as such tenant in tail could, in such case, have created, if not a bankrupt. But, by s. 59, every such deed of disposition must be enrolled within six months from the execution thereof, if of freeholds, in the Court of Chancery, and if of copyholds, in the Court rolls. Also, by ss. 60, 61, the base fee (if any) created in the exercise of the power conferred by s. 56, enlarges into a fee sim-

CONVEYANCES—continued.

ple absolute, so soon as there ceases to be a protector, although that event should not happen until some time subsequent to the date of the sale or conveyance to the purchaser. And, by ss. 62, 63, the disposition under ss. 56, 57 may either confirm or avoid, as the case may be, any voidable disposition made by the bankrupt himself; and the disposition under ss. 56, 57, may even be made, in certain cases, after the decease of the bankrupt (see s. 65). Lastly, when the bankrupt's estate is an estate at law, the deed of disposition under ss. 56, 57 is to have the effect of a surrender (see s. 66).

And, generally, by s. 71, all the previous sections of the Act are made to extend to money subject to be invested in the purchase of lands to be entailed, whether such money arises from the sale of other entailed lands or not.

(4.) By the stat. 3 & 4 Will. 4. c. 74, ss. 77–91, a married woman, not being tenant in tail, is enabled with her husband's concurrence (and, in certain special cases, without that concurrence), by deed to be acknowledged under the Act, to effect the following purposes:

- (aa.) To dispose of lands or of any estate therein;
- (bb.) To dispose of money subject to be invested in lands, or of any estate therein;
- (cc.) To release powers; and
- (dd.) To extinguish powers;

but in the case of copyholds, where these purposes, or any of them, can be effected by surrender, she is to effect the same by surrender. The deed so to be executed and acknowledged takes effect as from the date of the acknowledgment.

(5.) By the stat. 8 & 9 Vict. c. 119, intitled "An Act to facilitate the Conveyance of Real Property," and by numerous other subsequent Acts, certain concise forms of conveyances, leases, and assignments are introduced, which the respective Acts in general present in a schedule, and which they declare shall have the same effect as the longer but more customary forms.

CONVICTION. A conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced, and consists, first, of an information or charge against the defendant; secondly, of a summons or notice of such information, in order that he may make his defence; thirdly, his appearance, or non-appearance; fourthly, his defence, or confession; fifthly, the evidence against him in case he does not confess;

CONVICTION—*continued.*

and sixthly, the judgment or adjudication. (Bosaw, Pen. Con. 7; *R. v. Green*, Cald. Cas. 396, 397). A conviction may be appealed, or removed to the Queen's Bench by *certiorari*.

CONVOCACTION. In like manner as the Commons were represented from 1265, or at any rate from 1295, by deputies chosen from themselves, so the lower clergy were represented from 1255 by one proctor from the chapter of the cathedral and two proctors from the body of the clergy in each diocese. Also, the like cause which necessitated the early assembling of the Commons in Parliament, necessitated also the early assembling of the clergy in Convocation, namely, the principle of the English constitution that the subject has the exclusive right of self-taxation. Thus, in 11 Edw. 1, when the cathedral clergy of the province of York met at the town of York by their proctors, and the cathedral clergy of the province of Canterbury met at the town of Northampton by their proctors, but the body of the clergy were not represented at all in either assembly, no tax was imposed owing to the absence of the latter.

The clergy appear to have had no separate writ of summons, but to have been summoned originally by their respective archbishops, and subsequently, that is, from the reign of Edward I., by their respective bishops in virtue of the *præmunientes* clause contained in the writ of summons which was issued to these latter, the bishop acting in some sense as an ecclesiastical sheriff for this purpose. The archbishops having objected to the clergy being summoned by the bishops, their objection was neutralised by means of a compromise, according to which the bishops were permitted to summon the clergy to Parliament, and the archbishops to summon them to Convocation; but the two assemblies, once summoned, were identical.

The functions of the clergy assembled in Convocation or in Parliament (for the distinction is perfectly immaterial), were originally ill defined, judging at least from the language in which they are described, being sometimes the phrase "*ad ordinandum de quantitate et modo subsidii*," sometimes the phrase "*ad faciendum et consentiendum*," and latterly, *i.e.*, from 5 Ric. 2, "*ad consentiendum*" only; and in fact their functions appear to have varied at different times. Thus, in 18 Edw. 3, there are instances of petitions of the clergy having been granted by the King and his Council, and thereby converted into statutes, and entered as such on the statute roll, notwithstanding that the Commons had not assented thereto. In 50 Edw. 3,

CONVOCACTION—*continued.*

the Commons remonstrated against this interference with their legislative rights, and prayed the King that for the future no statute should be made upon the petition of the clergy unless with the assent of the Commons thereto. However, notwithstanding this protest, the practice continued in subsequent reigns, and notably in those of Richard II. and Henry IV., *e.g.*, the statute "*de hæretico comburendo*," 2 Hen. 4, was so passed; and Hallam concludes that in these reigns the clergy assembled in Convocation did exercise a legislative power with the King and his Council apart from the Commons.

These legislative acts of the clergy were confined to matters ecclesiastical; for in matters of a temporal nature the clergy assembled in Convocation neither enjoyed nor exercised any legislative power at all apart from, or even (*semble*) in conjunction with, the Commons.

In the reigns of Henry VIII. and Elizabeth, the clergy assembled in Convocation were consulted upon all or most of the momentous questions of those reigns affecting the national religion; *e.g.*, in 1533, they approved the doctrine of the Royal Supremacy over the Church, and in 1562, they confirmed the Thirty-Nine Articles of Religion. But in the former of these two reigns they were expressly deprived by statute of the power to enact fresh canons without the King's previous licence,—a disability which was confirmed and perpetuated by the doctrine of the Courts of Common Law, that new ecclesiastical canons are not binding on the laity until they are approved by both Houses of Parliament (*Croft v. Middleton*, 2 Atk. 669). Even the right of taxing themselves was made subject to the control of the House of Commons in the reign of Henry VIII., and the practice has been totally discontinued since the year 1664, since which year the clergy have been rated in the same manner and measure as the laity.

From the last-mentioned date the functions of Convocation were reduced to nothing; its assembling at the commencement of each Parliament was for some time afterwards kept up as a formality merely, being followed on each occasion of its so assembling with an immediate prorogation or adjournment. However, about 1690, when the High Church party attained to distinction and power, the attempt was made to revive Convocation as an active ecclesiastical body, and this attempt was successful during the reign of Anne (1702–1714). But in the succeeding reign of George I., Convocation carried its debates in the Bangorian controversy with Bishop Hoadley of Bangor to such a degree of in-

CONVOCACTION—*continued.*

tolerance, it is said, that that king was compelled in 1717 to prorogue it, and from that date till the beginning of the present reign it never sat again; but in the beginning of the present reign, when the High Church party re-acquired repute under Dr. Pusey and others of that school, Convocation was re-summoned for the despatch of matters purely ecclesiastical, and accordingly, but for the despatch only of these matters, it meets regularly at the present day with every fresh session of Parliament.

CONVOY. In times of war, it is frequently desired by a neutral country to protect its own merchant vessels from visit and search by either of the belligerents, and this object it usually endeavours to accomplish by sending one or more of its own ships of war to protect and escort, *i.e.*, *convoy*, the merchant vessels. But Sir Wm. Scott, in *The Maria* (1 Rob. 340), decided in effect that a neutral convoy cannot resist the right of visit and search, and that the resistance presented in that case was a reason for condemning the vessels. And it is now generally admitted that the protection of a conveying fleet does not extend to exclude the belligerent right of search; nor is the word of the commander of the squadron to be accepted as conclusive evidence of the neutrality of the vessels convoyed or of the goods that are stowed therein.

See also title **VISIT AND SEARCH**.

CO-PARCENERS. These are co-tenants entitled by descent, and by no other title. They become so either by the Common Law of England, as in the case of females that are co-heiresses; or by particular custom, as in the case of lands in Kent, which are of gavelkind tenure. Co-parcenary extends even to *collaterals*; and the husband of a deceased co-parcener, if entitled as tenant by the curtesy, holds as a co-parcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death. Co-parceners might always effect compulsory partition of the lands held together.

See title **PARTITION**.

COPY. When the original instrument is lost or is withheld, and its absence is in either of these ways accounted for, the Court is in the habit of admitting secondary evidence of it by looking at a copy. And where an original will has been lost, a copy of it also has been admitted to probate (1 Wms. Executors and Administrators, 864). But the rule of evidence is not extended so far as to admit the *copy* of a *copy* of an original instrument.

See title **EVIDENCE**.

COPYHOLDS. These are lands held by copy of Court roll (as the name partly denotes) and according to the custom of the manor. It appears that in the reign of Edward I. copyholders were still in the purest state of villenage, cultivating the demesne lands of the lord as serfs merely, and having no certainty of tenure; but that in the reign of Edward III. they enjoyed a comparative certainty of tenure, so long as they performed the accustomed services; and that, finally, in the reign of Edward IV. they might have an action against their lord for trespass or wrongful ejection.

But to the present day copyholds retain some traces of their frail original. Thus, the copyholder is still for some purposes a mere tenant at will of his lands, the freehold therein remaining in his lord, who, therefore, is owner of all the mines and minerals under the land, and also of the timber upon it; and the copyholder cannot, without a forfeiture, lease the lands for a longer term than one year, or commit any waste of the land.

Nevertheless, the copyholder when admitted (as to which see title **ADMITTANCE**) is possessed of a *quasi* seisin of his lands; in other words he is seised of them as against all the world other than his lord.

There may be every variety of estates in copyhold lands, whether for life, *pur autre vie*, in tail, or in fee simple; but with reference to the estate tail in copyholds, a distinction is taken, some manors admitting, and some not admitting the estate tail. See title **ESTATE TAIL IN COPYHOLDS**.

Copyholds were first made liable for the debts of the owner in 1833 after his decease (3 & 4 Will. 4, c. 114), and in 1838 during his life (1 & 2 Vict. c. 110). They are also liable in bankruptcy to the same extent as freeholds. They are devisable, and (since Preston's Act, 1815, 55 Geo. 3, c. 192) without any previous surrender to the use of the will; but in case the owner dies intestate, they descend to his customary heir.

Upon the death of a tenant his lord is entitled to seize his best beast, and he is also entitled to many other fines and perquisites on different occasions. But by the Act 4 & 5 Vict. c. 35, provision has been made for the voluntary enfranchisement, and by the Acts of 1852 and 1858 (15 & 16 Vict. c. 51, and 21 & 22 Vict. c. 94) for the compulsory enfranchisement, of copyholds, such enfranchisement having the effect of converting them into freeholds, upon payment either of a fixed annual sum, or of a lump sum, by way of commutation or composition for the lord's fines, perquisites, and heriots.

COPYRIGHT. Is the sole and exclusive

COPYRIGHT—continued.

liberty of multiplying copies of an original work or composition (*Jefferys v. Boosey*, 4 H. L. C. 920). It is a species of property founded on industrial occupancy, to wit, labour and invention bestowed on materials. The earliest evidence of a recognition of copyright is to be found in the charter of the Stationers' Company granted by Philip and Mary, and in the decrees of the Court of Star Chamber; and the first statute in the matter was the 8 Anne, c. 19, which professes to be passed for the encouragement and protection of learned men. This Act was repealed by the 5 & 6 Vict. c. 45, which, with some Acts amending same, now regulates the law of copyright. By the 3rd section of the principal Act it is enacted that the copyright in every book which shall be published in the lifetime of the author shall endure for the natural life of such author, and for the further term of seven years from his death, and shall be the property of such author and his assigns; but if the said seven years shall expire before the end of forty-two years from the first publication of such book, then the copyright shall in that case endure for the full period of forty-two years; and the copyright of every book which shall be first published after the death of its author shall endure for the term of forty-two years from the first publication thereof. But the right of property in copyright must be registered in the registry of the Stationers' Company; and after such registry it is assignable by a mere entry of the transfer in the same registry in the manner prescribed by the Act. International copyright is provided for by the 7 & 8 Vict. c. 12; but the provisions of that statute only go to secure to the authors of books published abroad the right of copyright when the same are republished in Her Majesty's dominions, and do not of course oblige foreign countries to extend to British authors the like protection.

In addition to copyright in books there may also be copyright in music, engraving, sculpture, painting, photography, and generally in ornamental and useful designs.

For a full treatment of the whole law of copyright, see Copinger on the Law of Copyright, 1870.

CORAM NON JUDICE (*before one who is not the judge*). When the judge of any Court of Law exceeds his jurisdiction, the subject matter with regard to which he has exercised such excess of jurisdiction is said to be *coram non judice*. Thus, in *Cole's Case* (Sir W. Jones, 170), it was held, by the whole Court, that if a justice does not pursue the form prescribed by the

CORAM NON JUDICE—continued.

statute the party need not bring a writ of error, because all is void and *coram non judice*. This holding is in accordance with the maxim of the Roman Law, which is also a maxim of the English Law,—*Extra territorium jus dicenti impune non parebitur*.

CORNAGE (*cornagium*, from the Latin *cornu*, a horn). Tenure by cornage was tenure by the service of blowing a horn when the Scots or other enemies entered the land, in order to warn the King's subjects, and was, like other services of the same nature, a species of grand serjeanty: see that title.

CORNWALL, DUCHY OF. The revenues of this duchy belong to the Prince of Wales for the time being. The *Nullum Tempus Act* (9 Geo. 3, c. 16) was extended by the 23 & 24 Vict. c. 53, as between the duke and persons claiming or holding real property within the duchy. The tenure of lands within the duchy was originally a holding from seven years to seven years; but in modern times it is become a holding to the tenant in fee simple, subject to a fine at the end of every seven years, and to forfeiture for non-payment thereof. *Us-ticks v. Peters*, 4 K. & J. 437.

CORODY. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned a species of incorporeal hereditaments, though not chargeable on or issuing out of any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance.

CORONATION OATH. Is the oath which is taken by the sovereigns of England on their coronation, promising "to govern the people of this kingdom, and the dominions thereunto belonging, according to the statutes in Parliament agreed on, and the laws and customs of the realm."

CORONER. An ancient officer of the Common Law, who has principally to do with pleas of the *Crown* (*corona*) or such wherein the king is more immediately concerned. He is chosen by the freeholders at the county court, and ought to have an estate sufficient to maintain the dignity of his office and to answer any fines that may be set upon him for his misbehaviour, &c. The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial but principally judicial. This is in a great measure ascertained by statute 4 Edw. 1, *de officio coronatoris*, and consists,

CORONER—continued.

first, in inquiring when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be *super visum corporis*, for if the body be not found the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest, of murder or other homicide, the coroner is to commit them to prison to await further trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby; but whether it be homicide or not, he must inquire whether any deodand has accured to the King, or the lord of the franchise, by the death; and must certify the whole of this inquisition under his own seal and the seals of the jurors, together with the evidence thereon, to the Court of King's Bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning *treasure trove* he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure. See 1 Fish. Dig. 1902-1915.

CORONER OF THE KING'S HOUSE (usually called coroner of the verge). An officer appointed by the lord steward, or lord great master of the King's house for the time being. His office resembles that of a coroner of a county, only that his duties are limited to such matters as occur within the verge or within the precincts of the King's palace. 1 Chitty's Bl. 137, note 20.

CORPORATION. Is a body created by Act of Parliament, or by charter, or by letters patent. It may be created either for trading or for other general purposes. It must have a common seal; and all its contracts originally required to be under that seal. But numerous relaxations of this rule have been latterly admitted; and the general state of the law now is, that for contracts of an ordinary every day occurrence a seal is not necessary, and that if such contracts have been executed, and the corporation has had the benefit of them, then the corporation is liable to be sued for the price (*Clarke v. Cuckfield Union*, 21 L. J. (Q. B.) 349); but that upon executory contracts of that sort, the corporation, *semble*, is not liable unless the contract is under seal. And the old law requiring the seal is still in force with regard to all contracts of an extraordinary kind, not within the usual business of the corporation, so that upon these latter kinds of

CORPORATION—continued.

contract the corporation cannot be sued, notwithstanding the contract is executed, and the corporation has had the benefit of it (*Arnold v. Mayor of Poole*, 4 Man. & G. 860), and *à fortiori*, if the contract in such case is executory.

But the above rules do not apply to a corporation sole (e.g., a bishop or other parson of the Church), but only to a corporation aggregate. Moreover, where a corporation aggregate is constituted by Act of Parliament, the Act commonly defines the mode by which, and the purposes for which it may contract; and if such a corporation exceeds the purposes so defined, it cannot, even by affixing its common seal, make a valid contract, inasmuch as that would be *ultra vires*.

A corporation is of course liable for torts. *Mersey Docks and Harbour Board v. Penhallow*, L. R. 1 H. L. 53.

CORPOREAL. The division of things into corporeal and incorporeal is coincident with the division of the Roman Law into tangible (*quæ tangi possunt*) and intangible (*quæ tangi non possunt*). The nomenclature of the Roman division is derived from the sense of touch, which was the most important of the senses in the opinions of the ancient Democritean School, or School of Natural Philosophy; the nomenclature of the English division is derived from the equally natural distinction of what is sensible to the body (or bodily senses) generally. In itself, the distinction, as resting in nature, is necessarily permanent; in its consequences, it was chiefly remarkable in the diversity which it occasioned in the mode of the transfer of property, for things which were corporeal were capable of manual or bodily transfer, e.g., by feoffment with livery, but things which were incorporeal were not capable of such a mode of transfer, and required for their transfer a deed of grant. Since the year 1845, and in consequence of the statute 8 & 9 Vict. c. 106, s. 2, the last-mentioned diversity has been mitigated, although not yet entirely removed, inasmuch as things corporeal are now capable of transfer by deed of grant, but things incorporeal are still (and must necessarily continue always to be) incapable of transfer by feoffment with livery.

See titles **CORPOREAL** and **INCORPOREAL HEREDITAMENTS**.

CORPOREAL HEREDITAMENTS. This phrase comprises all hereditaments which may be touched, *quæ tangi possunt*, e.g., lands, houses, &c. It is used in contradistinction to incorporeal hereditaments; as to which, see that title.

CORRUPT PRACTICES AT ELECTIONS:

See title **BRIBERY**.

CORRUPTION OF BLOOD. The immediate consequences of attainder used to be *corruption of blood*, both upwards and downwards; so that an attainted person could neither inherit lands or other hereditaments from his ancestor, nor retain those he already had, nor transmit them by descent to any heir, because his blood was considered in law to be corrupted. But by the Act for the Amendment of the Law of Descents (3 & 4 Will. 4, c. 106), s. 10, the doctrine of the corruption of blood has been abolished as to all descents happening after the 1st of January, 1834.

COSENAGE, or COSINAGE (Fr. *cousinage*). A writ that lay where the *tresail* (i.e., the father of the *besail* or great-grandfather) was seized of lands, &c., in fee on the day of his death, and afterwards a stranger entered and abated, and so kept out the heir. F. N. B. 221; Cowel.

COSTS. The expenses which are incurred either in the prosecuting or in the defending of an action are called the costs. Costs between *solicitor* or *attorney* and *client* are those which the client always pays his solicitor or attorney, whether such client is successful or not, and over and above what the attorney gets from the opposing party in case of such party having lost the action. Costs between *party* and *party* are those which the defeated party pays to the successful one as a matter of course. The plaintiff's right to party and party costs depends on the Statute of Gloucester, that of the defendant to the same costs on the stat. 23 Hen. 8, c. 15; and under these statutes the amount recovered in the action is immaterial (*Beaumont v. Greathead*, 3 C. B. 494). But under more recent statutes, where the damages recovered are trivial, the judge must in general certify for costs, e.g., in an action of tort, when the damages are under 40s. 3 & 4 Vict. c. 21, s. 11.

COSTS OF THE DAY. Whenever one of the parties in an action (i.e., the plaintiff or defendant) gives notice of his intention to proceed to trial at a specified time, and after having given such notice, neglects to do so, or to countermand the notice within due time, he is liable to pay to the other party such costs or expenses as the latter has been put to by reason of such notice, which costs are commonly called *costs of the day*, i.e., the costs or expenses which have been incurred on the day fixed (by such notice) for the trial. These costs usually consist of the expenses incurred by witnesses and others in coming to the place of trial, and such other expenses as have necessarily

COSTS OF THE DAY—continued.

been incurred in preparing for trial on the specified day. Arch. Prac.; Lush. Prac.; 6 Jur. 561.

COUNCIL, THE KING'S. This council, called also the *Aula Regis*, otherwise *Curia Regis*, was the parent of the Courts of Exchequer, Common Pleas, and Queen's Bench; but after the severance from it of those three Courts, it still retained a large original jurisdiction; and, as being in early times interchangeable with the House of Lords, it possessed also an appellate jurisdiction from the subordinate Courts. It possessed therefore (I.) *judicial* authority.

It possessed also (II.) *legislative* authority, in conjunction with the King, and apart from the Commons. Thus, in early times, the King and his council, sometimes upon the suggestion of the House of Commons, but more often without such suggestion, and in both cases without the concurrence of the Commons, enacted laws which appear in the statute book; 2 Ric. 2 is an instance of a law so made. But in 13 Ric. 2, the Commons petitioned the King that his council might not after the close of Parliament make any ordinance against the Common Law.

But the chief functions of the council were (III.) *executive*, the council forming (as it did) a body of assistance to the King in his administration. This appears from the list of the official members composing it, namely,—

- (1.) The Chancellor,
- (2.) The Treasurer,
- (3.) The Lord Steward,
- (4.) The Lord Admiral,
- (5.) The Lord Marshal,
- (6.) The Keeper of the Privy Seal,
- (7.) The Chamberlain of the Household,
- (8.) The Treasurer of the Household,
- (9.) The Controller of the Household,
- (10.) The Chancellor of the Exchequer, and
- (11.) The Master of the Wardrobe,

With a number of other assistant members of a subordinate character.

COUNSEL. A term frequently used to indicate *Barrister-at-Law*, which title see.

COUNSEL'S OPINION. Is in general a protection to an attorney acting upon it, against alleged negligence on his part. *Kemp v. Burt*, 4 B. & Ad. 424.

COUNSEL'S SIGNATURE. In former times the appearance of the parties to an action was actual and personal in open Court, and the pleadings consisted of an oral altercation in presence of the judges. But this could be carried on by none but

COUNSEL'S SIGNATURE—*continued.*

the parties themselves, or else by their regular advocates; and although the pleadings in an action are in the present day delivered in writing between the parties out of Court, yet they are still *supposed* to be delivered orally as of old (at least for certain purposes), and when the pleadings contain any new affirmative matter, such as would formerly have been put forward by counsel on behalf of his client, they require to bear the signature of some counsel, and formerly, in the Court of Common Pleas, of some serjeant. This signature is chiefly useful at the present day as affording to the Court some means of judging that the case is a proper one, and that it is also properly presented, for the decision of the Court.

COUNT (Fr. *conte*, a narrative.) In Common Law pleadings a section of a declaration is so called. Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same suit, subject to certain rules which the law prescribes as to joining such demands only as are of similar quality or character. Thus he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same action of debt. So, if several distinct trespasses have been committed, these may all form the subject of one declaration in trespass; but on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond, and a complaint of trespass; these being dissimilar in kind. Such different claims or complaints, when capable of being joined, constitute different parts or sections of the declaration, and are known in pleading by the description of *several counts*. And under the C. L. P. Act, 1852, s. 41, a plaintiff may join in one and the same declaration a count in contract with one in tort, provided they are both by and against the same parties, in the same right, and, *semble*, of a kind to admit of being properly tried together. Thus, a count in contract for breach of warranty may be fitly joined with a count in tort for a false and fraudulent representation, so that the plaintiff if he fail on the one may succeed on the other, according to his evidence.

COUNTERPART. Signifies little else than a copy of the original. Blackstone's definition of it is as follows:—When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts. The counterpart is for some purposes as good evidence as the original deed.

COUNTER PLEA. All pleadings of an incidental kind, diverging from the main series of the allegations, are called *counter pleas*: as when a party demanded oyer, in a case where upon the face of the pleading his adversary conceived it to be not demandable, the latter might *demur*, or if he had any matter of fact to allege, as a ground why the oyer could not be demanded, he might plead such matter, and if he pleaded, the allegation was called a *counter plea* to the oyer. Stephen on Plead. 79.

COUNTIES CORPORATE. Are certain cities and towns, some with more, some with less, territory annexed to them: to which, out of special grace and favour, the kings of England have granted the privilege to be counties themselves, and not to be comprised in any other county, but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, and many others.

COUNTIES PALATINE were so called a *palatio*, because the owners thereof, e.g., the Duke of Lancaster, had therein *jura regalia*, as fully as the King had in his palace. They might pardon treason, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the King's; and all offences were said to be done against *their* peace, and not, as in other places, *contra pacem domini regis*. The principal counties palatine in England were the Earldom of Chester, the Bishopric of Durham, and the Duchy of Lancaster; but all except the last have ceased altogether, and the last has ceased partially, to enjoy these rights.

COUNTY COURTS. These are a resuscitation of the shire-gemots, or County Courts of the Anglo-Saxon and Anglo-Norman times, but entirely remodelled to suit the wants of modern times. (See title **COURTS OF JUSTICE**.) These Courts were established on their present basis by the stat. 9 & 10 Vict. c. 95, intitled "An Act for the more easy Recovery of Small Debts and Demands in England," or shortly, "The County Courts Act, 1846." In pursuance of the provisions of this Act, the whole of England and Wales, with the exception of the City of London, was in the year 1847, by order in council, divided into districts, varying in extent and population, but contrived so as to suit the wishes and convenience of the inhabitants. There are now over 500 such Courts, and about as many districts. By the principal Act and subsequent Acts, the jurisdiction of

COUNTY COURTS—continued.

the County Courts has been settled as follows:—

I. Common Law Jurisdiction,—

- (1.) The recovery of debts, demands, and damages, not exceeding £50, a sum which may be reached either by abandoning the excess (*See* title **ABANDONMENT**), or by striking a set-off (*See* title **SET-OFF**), but not by splitting demands;
- (2.) Consent actions of every description (19 & 20 Vict. c. 108, s. 23);
- (3.) Ejectments, where the annual value and rent do not exceed the sum of £20 (30 & 31 Vict. c. 142);
- (4.) Actions for sums not exceeding £50 on contract transferred by order of a superior Court;
- (5.) Actions of tort transferred in like manner, upon affidavit of defendant, that plaintiff has no visible means of paying costs;
- (6.) The following applications under the C. L. P. Act, 1854;
 - (a.) Discovery of documents;
 - (b.) Interrogatories, and compelling an answer thereto;
 - (c.) Attachment of debts; and
 - (d.) Equitable defences and replications.

II. Equity Jurisdiction,—(under County Courts Act, 1865, 28 & 29 Vict. c. 99);

- (1.) Suits by creditors, legatees, heirs-at-law, and next of kin against, or for accounts, or administration of, personal or real estate, or both;
- (2.) Suits for the execution of trusts;
- (3.) Suits for foreclosure or redemption, or for enforcing any charge or lien;
- (4.) Suits for specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property;
- (5.) Proceedings under the Trustee Relief Acts, or Trustee Acts;
- (6.) Proceedings relating to the maintenance or advancement of infants;
- (7.) Suits for the dissolution or winding up of partnerships; and
- (8.) Proceedings for orders in the nature of injunctions.

But in each of these cases the amount at stake must not exceed £500.

III. Miscellaneous Jurisdiction,—

- (1.) Grant and revocation of probate of wills, or of letters of administration, where personal estate is under £200 (21 & 22 Vict. c. 95);
- (2.) Jurisdiction in Admiralty (31 & 32 Vict. c. 71; and 32 & 33 Vict. c. 51);

COUNTY COURTS—continued.

- (3.) Jurisdiction in Bankruptcy (32 & 33 Vict. c. 71).

The County Courts also exercise an auxiliary or ministerial jurisdiction to the superior Courts of Law and Equity.

COURTS OF JUSTICE. In Anglo-Saxon times, the Courts of Justice possessing (A.) *Civil* jurisdiction were the following:—

- (1.) Wittenagemot, — which was the Court of Appeal;
- (2.) Council of Wittenagemot, — being the prototype of the Privy Council;
- (3.) Shire-gemot, *i.e.*, County Court, called also Sheriff's Tourn, and being the Court of First Instance for general civil cases;
- (4.) Hundred Court; } being the two
and } Courts for cases
(5.) Tything Court; } of smaller and
merely local importance.

And the Courts of Justice of those times, which possessed (B.) *Criminal* jurisdiction were the following:—

- (1.) Wittenagemot;
- (2.) Shire-gemot, *i.e.*, County Court, called also Sheriff's Leet;
- (3.) Hundred Court; and
- (4.) Tything Court;

being the Courts of these several names enumerated above as having civil jurisdiction; and *see* title of each Court severally.

In Anglo-Norman times the above mentioned Courts, called respectively County Court, Hundred Court, and Tything Court, remained; but in addition to them, a new Court was introduced, being the Court called the *Aula Regis*, or *Curia Regis*, and which supplied the place of the Anglo-Saxon Wittenagemot, being, in fact, in those early times interchangeable with the House of Lords, which thereupon became the supreme Appellate Court, and had in those times and for centuries afterwards an original jurisdiction also.

From this *Aula Regis* have been successively developed, in addition to,—

- (1.) The House of Lords,—the following Courts, namely,
- (2.) The Judicial Committee of the Privy Council, which, however, has not even yet been permanently severed from the *Aula Regis*, but remains a committee still;
- (3.) The Court of Exchequer,—the separation of which from the *Aula Regis* is commonly assigned to the reign of Richard I., when the purposes of the king's revenue, for which exclusively it was set apart,

COURTS OF JUSTICE—continued.

necessitated its more permanent constitution as a Court;

- (4.) The Court of Common Pleas,—the separation of which from the *Aula Regis* is commonly assigned to a date anterior to the date of Magna Charta (1215), at which latter date the Court was fixed at Westminster, and received as the subject matters of its jurisdiction all civil causes between subject and subject, and in which the king had no interest; and inasmuch as such matters related in early times almost exclusively to real property questions, so it has happened that to the present day the Court of Common Pleas is primarily and properly concerned with freehold issues only;

- (5.) The Court of Queen's Bench,—which was the then residuum of the *Aula Regis* after the severance therefrom of the Courts of Exchequer and Common Pleas. The separation of the Court of Queen's Bench from the *Aula Regis* and its constitution into a separate isolated Court is commonly assigned to the reign of Edward I., that reign having been the epoch at which the Common Law Procedure, as it existed prior to 1852-60, was established in its principal features;

- (6.) The Court of Chancery, which was the then residuum of the *Aula Regis* after the Queen's Bench had been isolated from it. This Court acquired consistency as a Court in the reign of Edward III. under an ordinance 22 Edw. 3, which directed the Lord Chancellor to inquire of matters of "*grace*," and the Court was furnished in the succeeding reign (Richard II.) with its chief weapon, namely, the *subpena*, which was invented in that reign by Bishop Waltham, of Salisbury; and, in spite of strenuous opposition, the Chancery procedure by *bill* and *subpena*, as it existed until the year 1852, was fully established in the reign of Edward IV.;

- (7.) The Court of Exchequer Chamber. This Court was established by the stat. 31 Edw. 3, st. 1, c. 12. See title EXCHEQUER CHAMBER.

- (8.) The Star Chamber. This was the residuum of the *Aula Regis* remaining after the isolation of the Court of Chancery; and inasmuch

COURTS OF JUSTICE—continued.

as the Courts already established did not appropriate all matters of jurisdiction, and inasmuch as in particular the Court of Chancery never possessed any jurisdiction in criminal matters, so the Court of Star Chamber of those times had a jurisdiction partly civil but principally criminal, being supplementary to the other Courts, and interposing where those Courts were from any cause, whether from want of jurisdiction or from obstructions to their jurisdiction, incapable of doing justice or of giving redress;

- (9.) The Court of Admiralty, } being the
(10.) The Courts-Martial, } Courts
which were latterly developed respectively out of the jurisdiction of the Constable (over maritime causes), and of the Earl Marshal (over military causes).

In addition to the Courts before enumerated, there are two other jurisdictions, namely:

- (11.) Judges of Assize and Gaol Delivery, being the descendants of the Justices Itinerant or Justices in Eyre, who were appointed for the first time in the year 1176, by an Act of the Parliament held at Northampton in that year; and
(12.) The Courts Ecclesiastical, which (it is uncertain whether they) emanated from the royal person as supreme head of the Church, or from the person of the Church itself, or of the Pope, the representative and vicegerent of the Church of Christ on earth. At any rate, they did not emanate from the *Aula Regis*; although subsequently to the Reformation of Religion in the reign of Henry VIII., when that monarch assumed to be, and was recognised at law as being, supreme head of the Church of England, the Courts Ecclesiastical clearly derived their efficacy, like all other Courts and institutions, from his royal person, as the source of law and justice. The Courts Ecclesiastical were of many orders and varieties, as to which see title COURTS ECCLESIASTICAL; but at the present day they are principally the Consistory Courts of the bishop of each diocese, and the Court of Arches. See titles CONSISTORY; ARCHES, COURT OF.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), which takes effect on the 2nd of November, 1875, it is provided with re-

COURTS OF JUSTICE—continued.

ference to the Superior Courts of Justice that the numbers of such Courts and their gradation shall be as represented in the following statement, that is to say,—

(1.) The Act unites and consolidates into one Supreme Court of Judicature in England the following Courts, viz. (s. 3):

- (a.) High Court of Chancery,
- (b.) Court of Queen's Bench,
- (c.) Court of Common Pleas,
- (d.) Court of Exchequer,
- (e.) High Court of Admiralty,
- (f.) Court of Probate,
- (g.) Court of Divorce and Matrimonial Causes, and

(h.) London Court of Bankruptcy.

(2.) It subdivides the said supreme Court into two permanent divisions, to be called respectively (s. 4),

(a.) Her Majesty's High Court of Justice, and

(b.) Her Majesty's Court of Appeal.

The former of these two subdivisions to have original and some appellate jurisdiction, and the latter of them appellate and some original jurisdiction.

(3.) It constitutes as members of the High Court of Justice the following persons, namely (s. 5):

- (a.) The Lord Chancellor,
- (b.) The Lord Chief Justice of England,
- (c.) The Master of the Rolls,
- (d.) The Lord Chief Justice of the Common Pleas,
- (e.) The Lord Chief Baron of the Exchequer,
- (f.) The Vice-Chancellors of the High Court of Chancery,
- (g.) The Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes.
- (h.) The Puisne Judges of the Court of Queen's Bench,
- (i.) The Puisne Judges of the Court of Common Pleas,
- (j.) The Junior Barons of the Court of Exchequer, and
- (k.) The Judge of the High Court of Admiralty,

making the Lord Chancellor, and in his absence the Lord Chief Justice of England, president of the said Court, and providing also for the reduction of the number of the judges of the said Court to twenty-one.

(4.) It appoints as judges of the High Court of Appeal the following persons, namely (s. 6):

- (a.) The Lord Chancellor,
- (b.) The Lord Chief Justice of England,
- (c.) The Master of the Rolls,
- (d.) The Lord Chief Justice of the Common Pleas, and
- (e.) The Lord Chief Baron of the Exchequer;

COURTS OF JUSTICE—continued.

which five persons are to be the five *ex officio* judges of the said Court; also,

(f.) The Lords Justices of Appeal in Chancery,

(g.) The Judges of the Judicial Committee of the Privy Council, appointed and salaried under the Judicial Committee Act, 1871,

(h.) Three other persons to be appointed; which persons, being nine in number, are to be the nine ordinary judges of the said Court; and the same section provides for the appointment (if necessary) of additional judges of appeal, and that the Lord Chancellor shall be president of the said Court of Appeal.

(5.) It enables any judge of the Supreme Court (other than the Lord Chancellor) to resign his office therein by writing under his hand addressed to the Lord Chancellor; and providing also that the appointment of any judge of the High Court of Justice to be a judge of the Court of Appeal shall *ipso facto* vacate the former office (s. 7).

(6.) It makes eligible for the office of judge of the High Court of Justice (s. 8),—

- (a.) Any barrister of not less than ten years' standing; also, to make eligible for the office of judge of the Court of Appeal,—
- (b.) Any person having the qualifications to be appointed a Lord Justice of Appeal in Chancery as that office exists, and is qualified for at present; and

(c.) Any judge of the High Court of Justice of one year's standing.

And after providing for the tenure of the office of a judge of the said Supreme Court, and rendering every such judge incapable of sitting in the House of Commons, and prescribing the oaths to be taken by every such judge when he enters on the execution of his office (s. 9);

And after providing for the precedence of judges (s. 10), and for the non-judicial extraordinary duties of any judges (s. 12), and for the rights and obligations of existing judges (s. 11), and for the salaries of future judges (s. 13), and for the retiring pensions of future judges (s. 14), and for the mode of payment of the salaries and pensions of judges (s. 15), it goes on to make further provision as follows, that is to say,—

(7.) It constitutes the High Court of Justice a Superior Court of Record, and vests in it the following jurisdictions, namely (ss. 16, 17):

- (a.) The High Court of Chancery,—all the jurisdiction thereof, as well in its Common Law as in its Equity side, and including therein the ordinary and also the special

COURTS OF JUSTICE—continued.

jurisdiction of the Master of the Rolls, other than and except the following jurisdictions, that is to say,—

- (aa.) The appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal in Bankruptcy;
- (bb.) The jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster;
- (cc.) The jurisdiction, whether of the Lord Chancellor or of the Lords Justices, over idiots, lunatics, and persons of unsound mind;
- (dd.) The jurisdiction of the Lord Chancellor in the matter of letters patent and in the matter of commissions or other writings under the Great Seal;
- (ee.) The jurisdiction of the Lord Chancellor over colleges and charities; and
- (ff.) The jurisdiction of the Master of the Rolls over records in England.

- (b.) The Court of Queen's Bench,—all the jurisdiction thereof;
- (c.) The Court of Common Pleas at Westminster,—all the jurisdiction thereof;
- (d.) The Court of Exchequer,—all the jurisdiction thereof;
- (e.) The High Court of Admiralty,—all the jurisdiction thereof;
- (f.) The Court of Probate,—all the jurisdiction thereof;
- (g.) The Court for Divorce and Matrimonial Causes,—all the jurisdiction thereof;
- (h.) The London Court of Bankruptcy,—all the jurisdiction thereof;
- (i.) The Court of Common Pleas, at Lancaster,—all the jurisdiction thereof;
- (j.) The Court of Pleas at Durham,—all the jurisdiction thereof; and
- (k.) The Courts created by Commissioners of Assize, Oyer and Terminer, and Gaol Delivery,—all the jurisdictions thereof;

including in such jurisdictions the respective jurisdictions exercised by all or any one or more of the judges of the said Courts respectively, whether sitting in Court, or in Chambers, or elsewhere, and all powers ministerial and other of such respective Courts and of their or any of their said respective judges, and all duties and authorities incident to the same jurisdictions, or any part thereof respectively.

(8.) It constitutes the Court of Appeal a Superior Court of Record, and vests in

COURTS OF JUSTICE—continued.

it the following jurisdictions and powers, namely (s. 18):—

- (a.) The appellate jurisdiction (with the powers incident thereto) of the Lord Chancellor and of the Court of Appeal in Chancery, and of the same Court sitting as a Court of Appeal in Bankruptcy;
- (b.) The jurisdiction (with the powers incident thereto) of the Court of Appeal in Chancery of the County Palatine of Lancaster, and of the Chancellor of the Duchy and County Palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster;
- (c.) The jurisdiction (with the powers incident thereto) of the Court of the Lord Warden of the Stannaries and his assessors, and of the Lord Warden in his capacity of judge;
- (d.) The jurisdiction (with the powers incident thereto) of the Court of Exchequer Chamber;
- (e.) The appellate jurisdiction of Her Majesty in Council or of the Judicial Committee of Her Majesty's Privy Council in admiralty and lunacy matters; and (s. 19)
- (f.) An appellate jurisdiction in respect of all judgments and orders of the High Court of Justice or of any judges or judge thereof, with such powers incident thereto as are necessary for the exercise of the same jurisdiction, and as are before given to the High Court of Justice.

(9.) It excludes error or appeal being brought to the House of Lords or to the Judicial Committee of the Privy Council from any judgment or order of the following Courts, namely (ss. 20, 21):—

- (a.) The High Court of Justice;
- (b.) The Court of Appeal; and
- (c.) The Court of Chancery of the County Palatine of Lancaster,

without prejudice, however, to any pending or fresh writ of error or appeal to the House of Lords, or to the Queen in Council, or to the Judicial Committee of the Privy Council, from any judgment or order of the now existing Courts, so long as the same Courts continue to exist, but giving power to Her Majesty by Order in Council to direct that all appeals and petitions to herself in council at present referable by her to the Judicial Committee of the Privy Council shall be referred to the Court of

COURTS OF JUSTICE—continued.

Appeal, in exclusion of the Judicial Committee of the Privy Council, and conferring on the said Court of Appeal in that event the jurisdiction (with the powers incident thereto) that is now exercisable by the Judicial Committee of the Privy Council; and more particularly providing that, in the case of any ecclesiastical causes so to be referred to the Court of Appeal, that Court shall be constituted of such of the judges of the Court of Appeal (to be assisted by such assessors being archbishops or bishops of the Church of England) as Her Majesty may direct by any general rules to be made by Order in Council upon the advice of any five or more of the Judges of the Court of Appeal, and of any two or more of the said archbishops and bishops being members of the Privy Council, subject to the same rules being approved by Parliament.

(10.) It abrogates the several jurisdictions which in the Act are mentioned to be transferred to the High Court of Justice and the Court of Appeal respectively, subject to the following provisions as to the existing business of the said several jurisdictions on the 2nd of November, 1874, now extended to the 2nd of November, 1875, namely (s. 22):—

(a.) As to causes, matters, &c., fully heard, but being as to the judgments therein imperfect in any respect,—

The judgments in all such causes, matters, &c., are to be perfected by the said several jurisdictions respectively; and

(b.) As to causes, matters, &c., fully heard, and being as to the judgments therein perfect in every respect,—

The judgments in all such causes, matters, &c., may be executed, amended, or discharged by the High Court of Justice or Court of Appeal as the case may be; also,

(c.) As to causes, matters, &c., pending:—

(1.) All proceedings in error or on appeal therein, and also all proceedings before the Court of Appeal in Chancery are to be continued and concluded in the Court of Appeal;

(2.) All proceedings other than those three last-mentioned groups are to be continued and concluded in the High Court of Justice; and for these purposes the Court of Appeal and the High Court of Justice respectively

COURTS OF JUSTICE—continued.

are to have the same jurisdiction in respect of all such pending causes, matters, &c., as if the same had been commenced in the two last-mentioned Courts respectively, and may direct the continuance and conclusion of the same either according to the old mode of procedure or according to the new mode of procedure.

(11.) It defines that the new procedure and practice shall be regulated by the Judicature Act, and by rules and orders of Court made pursuant thereto, and in the absence of such regulation upon any special point, shall be as nearly as may be the same as the old procedure and practice (s. 23). And an intermediate Court of Appeal between the High Court of Justice and the Court of Appeal is proposed to be constituted, but the Bill introduced for that purpose, and designated the Supreme Court of Judicature Amendment Bill, 1874, has been thrown over until the next session of Parliament.

COURT BARON (*curia baronis*). The *Court Baron* is a Court incident to every manor in the kingdom, and is held by the steward of the manor, and is of two natures: *the one* a customary Court, appertaining entirely to copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to copyhold property; *the other* a Court of Common Law, which is the baron's or freeholders' Court, and is held for determining by writ of right all controversies relating to the right of lands within the manor; and also for personal actions, where the debt or damages do not amount to forty shillings.

COURT CHRISTIAN. The various species of Ecclesiastical Courts which took cognizance of religious and ecclesiastical matters were called *Courts Christian*, as distinguished from the Civil Courts.

COURT OF CONSCIENCE: See title CONSCIENCE.

COURT, COUNTY: See title COUNTY COURT.

COURT OF DELEGATES: See title COURTS ECCLESIASTICAL.

COURTS ECCLESIASTICAL. The Ecclesiastical Courts were Courts held by the king's authority, as supreme head of the church, for the consideration of matters chiefly relating to religion. The causes usually cognizable in these Courts were of three sorts, *pecuniary*, *matrimonial*, and *testamentary*. Pecuniary causes were such

COURTS ECCLESIASTICAL—continued.

as arose either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrued to the plaintiff; *matrimonial* causes were such as had reference to the right of marriage; as suits for the *restitution of conjugal rights*, for *divorces*, and the like; *testamentary* causes were such as related to wills and testaments, &c. The various species of Ecclesiastical Courts were as follows:—

(1.) *The Archdeacon's Court*, which was and is the lowest Court in the whole ecclesiastical polity. It is held, in the archdeacon's absence, before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's Court of the diocese.

(2.) *The Consistory Court* of every diocesan bishop, which is held in the cathedral of the diocese, for the trial of all ecclesiastical causes arising within the diocese, whereof the bishop's chancellor or his commissary is the judge.

(3.) *The Court of Arches*: See **ARCHES, COURT OF**.

(4.) *The Court of Peculiars*, which is a branch of, and annexed to, the Court of Arches. It has jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognizable in this Court.

(5.) *The Prerogative Court*, which was established for the trial of all testamentary causes, where the deceased had left *bona notabilia* (see that title) within two different dioceses; in which case the probate of wills belonged to the archbishop of the province. And all causes relating to wills, administrations, or legacies of such persons, were originally cognizable therein before a judge appointed by the archbishop, called the Judge of the Prerogative Court; but all this jurisdiction has now been transferred to the Court of Probate.

(6.) *The Court of Delegates*, appointed by the king's commission, under his great seal, and issuing out of Chancery, was the great Court of Appeal in all ecclesiastical causes. The power and franchises of this Court were, by 2 & 3 Will. 4, c. 92, transferred to the Privy Council.

(7.) *A Commission of Review* was a commission sometimes granted in extraordinary cases, to revise the sentence of the Court of Delegates, when it was apprehended they had been led into a material error. This appeal, however, is now to the king in council.

COURT OF HUSTINGS. This was the highest Court of record held at Guildhall for the City of London, before the mayor, recorder, and sheriffs. It determined pleas, real, personal, and mixed; and in this Court all lands, tenements, and hereditaments, rents, and services, within the City of London and suburbs, were pleadable in two hustings, one called *hustings of pleas of lands*, and the other *hustings of common pleas*. In the Court also the members who served for the City in Parliament were elected by the livery of the respective companies.

COURT-LEET. This is a Court of record held once or twice in every year within a particular hundred, lordship, or manor, before the steward of the *leet*, for the preservation of the peace, and the chastisement of divers minute offences. Its original intent was to view frank-pledges, that is, freemen within the liberty, who, according to the institution of Alfred the Great, were all mutually pledged for the good behaviour of each other.

See title **FRANK PLEDGE**.

COURT OF MARSHALSEA: See title **MARSHALSEA**.

COURT MARTIAL. A military Court for trying and punishing the military offences of soldiers in the army.

COURT OF PECUILIARS: See title **COURTS ECCLESIASTICAL**.

COURTS OF PRINCIPALITY OF WALES. A species of private Courts of a limited though extensive jurisdiction; which, upon the thorough reduction of that principality and the settling of its polity in the reign of Henry VIII., were erected all over the country. These Courts, however, have been abolished by 1 Will. 4, c. 70; the principality being now divided into two circuits, which the judges visit in the same manner as they do the circuits in England, for the purpose of disposing of those causes which are ready for trial.

COURT OF RECORD. Is a Court the judgment and proceedings of which are carefully registered and preserved, under the name of *records*, in public repositories, and to them frequent recourse is had when any critical question arises, in the determination of which former precedents may give light or assistance. By stat. 1 & 2 Vict. c. 94, the public records of the kingdom are now in general placed under the superintendence of the Master of the Rolls for the time being, and a public record office has been established.

COURT OF REQUESTS: See title **CONSCIENCE, COURT OF**.

COURT OF REVIEW: See title REVIEW, COURT OF.

COURT OF STAR CHAMBER (*camera stellata*). A Court of very ancient original, but new-modelled by stat. 3 Hen. 7, c. 1, and 21 Hen. 8, c. 20, consisting of divers lords spiritual and temporal, being privy counsellors, together with two judges of the Courts of Common Law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other misdemeanors contrary to the laws of the land; yet it was afterwards stretched to the asserting of all proclamations and orders of state, to the vindicating of illegal commissions and grants of monopolies; holding for honourable that which it pleased, and for just that which it profited, and becoming both a Court of Law to determine civil rights, and a Court of Revenue to enrich the treasury. It was finally abolished by 16 Car. 1, c. 10, to the general satisfaction of the whole nation.

See also STAR CHAMBER, COURT OF.

COURT OF THE LORD STEWARD OF THE KING'S HOUSEHOLD, or (in his absence) of the treasurer, comptroller, and steward of the *Marshalsea*, was erected by stat. 33 Hen. 8, c. 12, with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings, whereby blood should be shed in or within the limits (*i.e.*, within 200 feet of the gate) of any of the palaces and houses of the king, or any other place where the royal person should reside. 4 Inst. 133.

COURTS OF THE UNIVERSITIES. The Chancellor's Courts in the two universities of England used to enjoy the sole jurisdiction, in exclusion of the King's Courts, over all civil actions and suits whatsoever, when a scholar or privileged person was one of the parties; excepting in such cases where the right of freehold was concerned. These privileges were granted in order that the students might not be distracted from their studies by legal process from distant Courts. And these University Courts were at liberty to try and determine either according to the Common Law of the land, or according to their own local customs, at their discretion. These privileges are still in part exercised at Oxford, but by a recent private statute have been taken away from Cambridge. In pursuance of the statutes, 17 & 18 Vict. c. 45, and 25 & 26 Vict. c. 26, s. 12, the procedure is as in the County Courts; and the rules

COURTS OF THE UNIVERSITIES—*cont.*
of the Statute Law of England have taken the place of the rules of the Civil Law.

COURTS AT WESTMINSTER. The superior Courts, both of Law and Equity, have for several centuries been fixed at Westminster Hall, an ancient palace of the monarchs of this country. Formerly all the superior Courts were held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided, and removed with his household from one end of the kingdom to another. This was found to occasion great inconvenience to the suitors, to remedy which it was made an article of the great charter of liberties both of King John and King Henry III., that "common pleas should no longer follow the King's Court, but be held in some certain place," in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. The Courts of Equity also sit at Westminster nominally during term time, although actually only during the first day of term, for they generally sit in Courts provided for the purpose in the neighbourhood of Lincoln's Inn.

COVENANT. Is a mere agreement or promise under seal, and may be either to pay a liquidated sum of money or unliquidated damages, or to do, or abstain from doing, any particular act.

Covenants are of various kinds, the principal of which are the following:—

(1.) Express and Implied Covenants.—The former being in so many words, the latter arising by inference from the use of other words, *e.g.*, "demise," which implies a covenant for quiet enjoyment, "grant, bargain, and sell," which, as regards lands in the East and North Ridings of Yorkshire, imply a covenant for title;

(2.) General and Specific Covenants,—the former relating to land generally and placing the covenantee in the position of a specialty creditor only, the latter relating to particular lands and giving the covenantee a lien thereon;

(3.) Inherent and Collateral Covenants,—the former affecting the particular property immediately, the latter affecting some property collateral thereto;

(4.) Joint and Several Covenants,—the former binding both or all the covenantors together, the latter binding each of them separately. A covenant may be both joint and several at the same time. Covenants are usually joint or several according as the interests of the covenantors are such; but the words of the covenant, where they are unambiguous, will decide: although where they are ambiguous, the nature of

COVENANT—continued.

the interests as being joint or several is left to decide. *Bradburne v. Ratfield*, 14 M. & W. 559.

(5.) **Real and Personal Covenants.**—These covenants being also sometimes called respectively covenants which run with the land and covenants which lie against the personalty. The former, whether beneficial or burdensome, attach to the successive owners of the property in virtue of their being such; but both varieties of covenant, *i.e.*, as well the real as the personal, form the basis of an action for damages against the covenantor himself, or, if he is dead, against his executors or administrators, and even against his heir, if the heir is specially named in the covenant. The statute, 22 & 23 Vict. c. 35, ss. 27, 28, has limited the liability of executors and administrators in respect of the rents, covenants, and agreements of their testator or intestate. See also titles EXECUTORS, ADMINISTRATORS, and ASSIGNS. If the covenant does not concern the land itself, but only a particular mode of occupying or using the same, it does not run with the land, and the assignee of the lease (not being expressly named in the covenant) cannot sue the lessor upon it. *Thomas v. Hayward*, L. R. 4 Ex. 311.

The benefit of real covenants passes to the heirs of the covenantee, although entered into with him and his executors and administrators only; also, the benefit of such covenants entered into with the covenantee his heirs and assigns, or even with the covenantee and his heirs only, passes to all persons taking the estate of the covenantee, or any estate derived out of such estate. Hence, when covenants are entered into with the *releasee to uses* and his heirs and assigns, or with him and his heirs only, they run with the land for the benefit of all the *cestui que use* whose estates are derived out of the momentary seisin of such releasee, whether such *cestui que use* are or are not parties to the conveyance, and whether they claim immediately under it or by virtue of an appointment made under a power contained in that conveyance. But when the covenants are made with the *cestui que use* and his heirs and assigns, or with him and his heirs only, although they run with the land for the benefit of any person who claims as alienee of his estate, yet they do not run with the land for the benefit of an APPOINTEE of the *cestui que use*, the reason being that such appointee, although the alienee of the *cestui que use* is not the alienee of his estate, but of a new estate which is substituted for it, and which takes effect, not out of the seisin of the *cestui que use*, but out of the original seisin

COVENANT—continued.

of the releasee to uses. Wherefore it is better, when the releasee to uses and the purchaser are different persons, for the covenants to be made with the releasee to uses and not with the *cestui que use*.

Again (6.), *Covenants* may be either *dependent* or *independent*. Thus, if A. covenant with B. to serve him for a year, and B. covenant with A. to pay him £10, the covenants are independent, and A. may maintain an action of debt or covenant against B. for the money before any service; on the other hand, if B. had in the case before mentioned covenanted to pay A. £10 *for the service*, the words in italics would have made the second covenant dependent on the first, and the service becoming in that way a condition precedent, A. could not have enforced payment of the money without averring and proving the performance of the service. By the C. L. P. Act, 1852, s. 57, such averment may now be general. Again, where A. covenanted with B. to marry B.'s daughter, and B. covenanted with A. to convey an estate to A. and the daughter in tail special, it was held that the covenants were independent, and that A. might marry another woman and yet have an action of covenant against B.; on the other hand, if B. had covenanted with A. in the last-mentioned case to convey the estate to him and the daughter *for the cause aforesaid*, the words in italics would have made the second covenant dependent on the first, and A. could not have had his action of covenant against B. without having first married the daughter of B. See 1 Wms. Saund. (ed. 1871), p. 549.

The distinction between covenants dependent and covenants independent, together with the practical importance of that distinction, being apparent, the following are the rules for deciding whether in any given case a covenant is dependent or independent:—

(1.) If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to (or may) happen *before* the thing which is the consideration for the money or other act is to be performed, an action may be brought for the money or to enforce doing the other act, before the performance of the consideration (*Ughtred's Case*, 48 Edw. 3, 2, 3; *Thorpe v. Thorpe*, 12 Mod. 461). But it is otherwise, if the day is to happen after the consideration. *Thorpe v. Thorpe*, 2nd resolution, 12 Mod. 462; and see *Portage v. Cole*, 1 Wms. Saund. (ed. 1871), p. 548.

(2.) Where a covenant goes only to part of the considerations on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant,

COVENANT—continued.

and an action may be maintained for a breach of the covenant on the part of the defendant, without any averment of performance in the declaration; a very remarkable illustration of such an action will be found in *Boon v. Eyre* (1 H. Bl. 273, n. (a)). And it is a general rule of law, that where the consideration has been executed in part, that which was at first a condition precedent, becomes for the purposes of pleading a warranty merely, for the breach of which a compensation must be sought in damages (*Behn v. Burgess*, 3 B. & Sm. 751); unless indeed the consideration is entire and indivisible, in which case there can be no partial failure, but the consideration if it fail at all must fail altogether (*Chanter v. Leese*, 4 M. & W. 295; 5 M. & W. 698). But it is otherwise where the mutual covenants go to the whole consideration on both sides; for in that case they are mutual conditions precedent, and performance must be averred. *St. Alban's (Duke) v. Shore*, 1 H. Bl. 270.

(3.) Where two acts are to be done at the same time, neither party can maintain an action against the other, without shewing performance of, or an offer to perform, his part, although it be not defined which of them is obliged to do the first act; and this third rule applies more especially to all cases of sale. *Peeters v. Opie*, 2 Wms. Saund. (ed. 1871), 742.

See also title **CONDITIONS PRECEDENT**.

CREDIT, LETTER OF. Is an instrument in common use among bankers for the transmission of money either within the United Kingdom, or to the colonies, or to foreign countries. It is not negotiable as a cheque, but is only an authority from the banker who signs it to the banker [or other person] to whom it is addressed upon advice to honour the drafts of the person named in it upon his producing the letter. If the letter of credit is stolen or lost, the banker upon whom it is drawn is liable in case he honours the drafts or pays the amounts upon a forged signature; and the 16 & 17 Vict. c. 59, s. 19, does not apply to these letters, as it does to the drafts therein specified.

CRIBER. An officer attached to the Courts of Common Law, whose duty it is to call a plaintiff who is nonsuited at the trial (see title **CALLING THE PLAINTIFF**), or to call the jury, &c. His fees (as are those of the other officers of the Courts) are regulated by a table of fees sanctioned by the judges under the authority of 7 Will. 4 & 1 Vict. c. 30. *Bagley's Pr.* 8.

CRIME. The distinction between a crime and a tort, or civil injury, is, that the

CRIME—continued.

former is a breach and violation of the public rights and duties due to the whole community, considered as such, in its social aggregate capacity; whereas the latter is merely an infringement or privation of the civil rights which belong to individuals considered merely in their individual capacity.

See title **CRIMINAL LAW**.

CRIMINAL CONVERSATION. This was the name of an action in which a husband proceeded for damages sustained by him in his wife by the act of an adulterer of her body. It was abolished by the stat. 20 & 21 Vict. c. 85, s. 59, but the husband may at the present day petition the Court of Probate for damages in such a case, without asking for a divorce also.

CRIMINAL INFORMATION. This is a mode of proceeding available in cases of alleged libellous publications, and in some other matters. It is within the discretion of the Court to grant or refuse it according to the circumstances (*Anon.*, Loft. 323); and the Court will not entertain an application for it on light or trivial grounds, but will leave the party to his remedy (if any) by action or indictment (*Heg. v. Mead*, 4 Jur. 1014). The Attorney-General or (during the vacancy of that office) the Solicitor-General may, however, file such an information *ex officio*, and without application to the Court (*Rez v. Plymouth (Mayor)*, 4 Burr. 1087); and he may even stop the proceedings upon his first information, and file a second one (*Rez v. Stratton*, 1 Doug. 238). To an information for a libel, the defendant may, under 6 & 7 Vict. c. 96, s. 6, plead in his justification the truth of the matter published.

A criminal information also lies against a magistrate who acts from corrupt motives, or who improperly grants or refuses an alibi; but the magistrate must have notice of the intention to apply for the information against him. And the party applying for an information must in all cases come with clean hands.

CRIMINAL LAW. The persons concerned in the commission of a crime may be concerned in it either as Principals, or as Accessories, or as Abettors, as to the distinctions between whom, see these three several titles.

The varieties of crimes are innumerable; they are, however, distinguished generally into three classes, viz., Treasons, Felonies, and Misdemeanours; as to the distinction between which, see these several titles. The particular offences (such as Arson, Bigamy, Burglary, Murder, &c.) will be found explained under each particular head.

CRIMINAL LAW—*continued.*

The mode of procedure in criminal cases is various, being either (1.) by indictment, which is the regular course (*see* title **INDICTMENT**); or (2.) by summary proceedings before a magistrate (*see* title **SUMMARY CONVICTIONS**); or (3.) by Criminal Information (*see* that title).

For the evidence adduceable in support of and against the charge, *see* title **EVIDENCE**.

And with reference to appeals and proceedings in the nature thereof in criminal cases, the following is a statement of the present law upon the subject:—

(1.) No *new trial* can be granted in cases of felony; but with respect to misdemeanours, it is entirely discretionary with the Court whether it will grant or refuse a new trial. *Rez v. Maubey*, 6 T. R. 638.

(2.) It is contrary to the policy of the English Law that there should be an *appeal* in cases of felony (*Ex parte Eduljee Byramjee*, 5 Moo. P. C. C. 276); nevertheless the stat. 11 & 12 Vict. c. 78, enables the judge to reserve any point arising on the trial for the consideration of the Court for Crown Cases Reserved, which is established by that Act; but

(3.) After judgment the record may be removed by writ of error, in any case where an error, either of law or of fact, appears on the record; this writ of error lies from quarter sessions to the Queen's Bench, and from the Queen's Bench to the Exchequer Chamber. But, *semble*, in a case of misdemeanour (as distinguished from felony) the previous fiat of the Attorney-General is requisite, and it is in his discretion to grant or refuse his fiat. *Reg. v. Newton*, 4 El. & Bl. 869.

CROSS ACTION. Where A. having brought an action against B., B. brings an action against A. upon the same subject-matter, or arising out of the same transaction, this second action is called a *cross action*. And this double action is sometimes necessary to insure justice to both parties; as in the case of a contract in which neither of the contractors is subjected to any condition precedent to his right to enforce performance by the other of his part; but the promises on each side are independent of what is to be done upon the other. In such a case the non-performance of the plaintiff's promises would be no defence to an action for the non-performance of the defendant's, whose sole remedy, therefore, against the plaintiff would be by a cross action (6 T. R. 570; 9 B. & C. 259). However, in many cases, a cross action is rendered unnecessary, and the party may raise by answer or defence what he formerly

CROSS ACTION—*continued.*

required to raise by cross action. *See* also next title.

CROSS BILL. A suit in Equity is commenced by the plaintiff filing his bill, wherein are stated all circumstances which gave rise to the complaint; the defendant's mode of defence is then usually by *answer*, wherein he controverts the facts stated in the bill, or some of them, &c. But when he is unable to make a complete defence to the plaintiff's bill without disclosing some facts which rest in the knowledge of the plaintiff himself, he then files what is called a *cross bill*, which differs in no respect from the plaintiff's original bill, excepting that the occasion which gave rise to it proceeded from matter already in litigation. A cross bill is in many cases necessary in aid of the defence, which cannot properly be raised by answer merely, as in cases of alleged fraud. However, under the Judicature Act, 1873 (36 & 37 Vict. c. 66), Sch. r. 20, a cross action will hardly in any case be now necessary in aid of a defence.

CROSS DEMANDS. These arise where one man against whom a demand is made by another, in his turn makes a demand against that other, and of such *cross demand* a *set-off* is in law the most familiar instance, a set-off being a statutory right of balancing mutual debts between the plaintiff and defendant in an action. 1 Chit. Pl. 595. *See* also preceding titles.

CROSS REMAINDER: *See* title **REMAINDER**.

CROWN COURT. Is the Court in which the Crown or criminal business of the assizes is transacted.

See titles **CIVIL SIDE**; **PLEA SIDE**.

CROWN DEBTS. These are debts due to the Crown, usually from persons who were accountants to the Crown, but also on record, bond, or specialty, generally to the Crown. The liability of lands to make good these debts attached to the lands even in the hands of *bona fide* purchasers for value without notice, and notwithstanding the purchaser had no means of notice. But latterly, by the stats. 2 & 3 Vict. c. 11, s. 8, and 22 & 23 Vict. c. 35, s. 22, it was enacted, that lands should not be charged in the hands of purchasers with Crown debts unless or until such debts were duly registered and re-registered, whether or not the purchaser had notice thereof. And now, by the stat. 28 & 29 Vict. c. 104, s. 4, a writ of execution in respect of the debt must also have been issued and registered, in order to affect a purchaser, in addition to the registration and re-registration of

CROWN DEBTS—*continued.*

the debt itself under the former Acts, whether or not the purchaser have notice of the debt.

CROWN OFFICE. An office of the Court of Queen's Bench, the master of which is usually called Clerk of the Crown, and in pleading and other law proceedings is styled "coroner and attorney of our Lady the Queen." In this office, the Attorney-General and Clerk of the Crown exhibit informations for crimes and misdemeanours, the former *ex officio*, the latter commonly by order of the Court. And by 4 & 5 W. & M. c. 18, the master of the Crown Office may file criminal informations, with leave of the Court, upon the complaint or relation of a private subject. 1 Arch. Pract. 9.

CROWN PAPER. A paper containing the list of criminal cases which await the hearing or decision of the Court. The term is commonly applied to the Court of Queen's Bench, which has an exclusive criminal jurisdiction; and it then includes all cases arising from informations *quo warranto*, criminal informations, criminal cases brought up from inferior Courts by writ of *certiorari*, and cases from the sessions. Bagley's Pr. 559.

CUCKING-STOOL. An engine of correction for common scolds, which in the Saxon language is said to signify the scolding-stool, though now it is frequently corrupted into *ducking-stool*, because the judgment is, that when the woman is placed therein, she shall be plunged in the water for her punishment. It is also variously called a trebucket, tumbrel, and castigatory. 3 Inst. 219.

CUI ANTE DIVORTIUM. A writ which lay for a woman, when a widow or when divorced, to recover her estate, which her husband, during her coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit*), has aliened. Britton, c. 114, fol. 264.

CUI IN VITA: See title CUI ANTE DIVORTIUM.

CULPRIT. Besides its popular sense of a prisoner accused of some crime, it used formerly to be made use of in the following manner. When a prisoner had pleaded not guilty, *non culpabilis*, or *nient culpable*, which used to be abbreviated upon the minutes thus, "*non* (or *nient*) *cul*," the clerk of the assize, or clerk of the arraigns, on behalf of the Crown, replied that the prisoner is guilty, and that he was ready to prove him so. This was done by two monosyllables in the same spirit of abbrevi-

CULPRIT—*continued.*

viation, "*cul* *prit*," which signifies, first, that the prisoner was guilty (*cul*, *culpable*, or *culpabilis*), and then that the king was ready to prove him so, *prit*, *præsto sum*, or *paratus verificare*. This was therefore a replication on behalf of the king *visâ voce* at the bar, which was formerly the case in all pleadings, as well in civil as in criminal causes.

CUM TESTAMENTO ANNEZO. Where a deceased person has made a will, but without naming any executor, or has named incapable persons; or where the executors appointed refuse to act, or die intestate, in any of these cases the Court of Probate must grant administration *cum testamento annezo* (with the will annexed) to some other person, in the choice of whom the Court usually prefers the residuary legatee to the next of kin. 1 Wms. Exors. 348.

See title ADMINISTRATION, LETTERS OF.

CUMULATIVE LEGACY. Legacies are said to be cumulative as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question whether the legatee be entitled to both, i.e., whether the second legacy shall be regarded as a repetition merely of the prior bequest, or as an additional bounty and cumulative to the other benefit. On this point the intention of the testator is the rule of construction. 2 Wms. Exors. 1020.

See REPETITION OF LEGACIES.

CURE BY VERDICT, TO. After a cause has been sent down to trial, the trial had, and the verdict given, the Courts overlook defects in the statement of a title, which would be available on a demurrer, or if taken at an earlier period. This is what is meant by the term *cure by verdict*; and the reason of it is, that the Courts presume that all circumstances necessary in form to complete a title imperfectly stated were proved before the verdict was given; which reason explains the limitation laid down as to the effect of the verdict, viz., that it cures the statement of a title defectively set out, but not of a defective title; for where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for the usual presumption. 1 Smith, L. C. 614, *Rush-ton v. Aspinall*.

See further title AIDED BY VERDICT.

CURSITORS. Were officers connected with the Court of Chancery, of very ancient institution, and twenty-four in num-

CURSITORS—continued.

ber. They used to make out all original writs; and the business in the several counties in England in this respect was distributed among them by the Lord Chancellor, by whom they were also appointed. They were called *curiators*, from the writs *de cursu*; in stat. 18 Edw. 3, c. 5, they are called clerks of *courses*.

See also title **Writs**.

CURTSEY OF ENGLAND, TENANT BY THE. When a man marries a woman seised of an estate of inheritance, *i.e.*, of land and tenements in fee simple, or fee tail, and has by her issue born alive, which was capable of inheriting her estate; in this case he shall, on the death of his wife, hold the lands for his life as *tenant by the curtesy of England* (Litt. 35, 52; 2 Bl. 126). And this right is left unaffected by the M. W. P. Act, 1870 (33 & 34 Vict. c. 93).

CURTILAGE (*curtilagium*, from the Fr. *cour*, court, and Sax. *leah*, locus). A piece of ground lying near and belonging to a dwelling-house, as a court, yard, or the like. Cowel.

CUSTOM (*consuetudo*). Is a law not written, but established by long usage, and the consent of our ancestors. *Customs* are either *general* or *particular*; general customs are the universal rule of the whole kingdom, and form the Common Law in its stricter and more usual signification, *e.g.*, primogeniture: particular customs are those which for the most part affect only the inhabitants of particular districts, such as gavelkind in Kent, and the like. The Courts are bound to take notice of general customs, but particular customs must be both pleaded and proved before they are judicially noticed. Moreover, a general custom is always good, but a particular custom, in order to be good must present the following characteristics:—

- (1.) It must be reasonable,
- (2.) It must be certain,
- (3.) It must be compulsory,
- (4.) It must be immemorial, and
- (5.) It must be possible in law.

CUSTOMS OF LONDON. These are particular customs relating to the government of the City of London, and also to trade, apprentices, widows, orphans, &c., within the City. They differ from all other customs in point of trial, for if the existence of the custom be brought in question it shall not be tried by a jury but by certificate from the lord mayor and aldermen by the mouth of their recorder, unless it be such a custom as the corporation is itself interested in, as a right of taking

CUSTOMS OF LONDON—continued.

toll, &c., for in this latter case the law does not permit them to certify on their own behalf.

CUSTOM OF MERCHANTS (*lex mercatoria*). A particular system of customs used only among one set of the king's subjects, which, however different from the general rules of the Common Law, is yet engrafted into it, and made part of it, being allowed for the benefit of trade to be of the utmost validity in all commercial transactions, it being a maxim of Law *cuiuslibet in sua arte credendum est*. This *lex mercatoria*, or *custom of merchants*, comprehends the laws relating to bills of exchange, mercantile contracts, sale, purchase, and barter of goods, freight, insurance, &c. The statute law has adopted many of these customs of merchants; and, conversely, it has been suggested that a large part of mercantile customs have had their origin in forgotten statutes.

CUSTOMS AND SERVICES annexed to the tenure of lands are those which the tenants thereof owe unto their lords, and which, if withheld, the lord might anciently have resorted to a *writ of customs and services* to compel them (Cowel). But at the present day he would merely proceed to eject the tenant as upon a forfeiture.

CUSTOMARY TENANTS. Tenants who hold their estates according to the custom of the manor. A copyhold tenant is so called because he holds his estate by copy of Court roll by will of the lord according to the *custom of the manor*; and although a distinction has been made between a copyholder and a *customary tenant*, yet they both agree in substance, and the difference, if any, between them consists only in this, that a copyhold proper is expressly stated in the grant to be at the will of the lord of the manor, whereas a customary freehold is not so stated, but the same thing is implied.

See title **COPYHOLDS**.

CUSTOS ROTULORUM. A special officer to whose custody the *records* or *rolls* of the sessions are committed; he is always a justice of the *quorum*, and is usually selected for his wisdom, countenance, or credit; his nomination is by the king's sign manual, and to him the nomination of the clerk of the peace belongs, which office he is expressly forbidden to sell for money. 37 Hen. 8, c. 1; Lombard.

CUSTOS OF THE SPIRITUALITIES. He who exercises spiritual or ecclesiastical jurisdiction in a diocese during the vacancy of the see. Cowel.

CUSTOS OF THE TEMPORALITIES.

He to whose custody a vacant see or abbey was committed by the king as supreme lord, and who, as steward of the goods and profits thereof, was to give an account to the king's *escheator*, who rendered an account thereof into the exchequer. His trust continued till the vacancy was supplied by a successor, who obtained the king's writ *de restitutione temporalium*, which was sometimes after and sometimes before consecration, though more frequently after. Cowel.

CUSTOMA ANTIQUA SIVE MAGNA

(*ancient or great duties*). Duties payable by every merchant, as well native as foreign, on wool, sheepskins, or woollfells, and leather exported; the foreign merchant had to pay an additional toll, viz., half as much again as was paid by the natives.

See also title **TAXATION**.

CUSTOMA PARVA ET NOVA (*small*

and new duties). Imposts of threepence in the pound, due from merchant strangers only, for all commodities as well imported as exported, and usually called the alien's duty. These customs were first granted in 13 Edw. 1. 4 Inst. 22.

See also title **TAXATION**.

CY-PRÉS (*as near as, so near*). In

cases where an attempt is made to create a perpetuity, i.e., to limit the estate to several successive lives in *futuro*, there is a material difference between a deed and a will; for in the case of a deed all the limitations are totally void; but in the case of a will, the Courts do not, if they can possibly avoid it, construe the devise to be utterly void, but explain the will in such a manner as to carry the testator's intention into effect, as far as the rule respecting perpetuities will allow, which is called a construction *cy-prés* (6 Cruise, Dig. 165). For example, where a life estate is given by will to an unborn person, with remainder in tail to the child of such unborn person, the Courts will give the estate tail to the first unborn person in lieu of his estate for life, and so as to leave to the second unborn the chance of the estate tail in that way descending upon him, which it will do if not barred. *Cy-prés* does not apply to personal property, there being no estate tail in such property.

D.

DAMAGE-FEASANT. This means doing damage (*damnum facio*), and is commonly applied to the beasts of a stranger wandering in another man's grounds, and doing

DAMAGE-FEASANT—*continued.*

him damage, i.e., hurt, by treading down his grass, eating his growing crops, and the like, in which case the owner of the land may distrain them until satisfaction is made him for the injury.

See also titles **DISTRESS**; **POUND**; **REPLEVIN**.

DAMAGES. Are a pecuniary compensation recoverable by action for breach of contract or for tort. The measure of damages, or test by which the amount of damages is to be ascertained, is in general the same both in contract and in tort, with this single distinction, that the intention with which a contract is broken is perfectly immaterial, while the intention with which a tort is committed may fairly be regarded by the jury in assessing the amount of damages; and generally the Court is not particularly careful to weigh "in golden scales" the damages recoverable in tort.

However, in both cases, the general rule is, that damages are, and ought to be, purely compensatory. Occasionally, therefore, only nominal damages will be recovered. But usually the damages are a substantial sum, and that sum is either ascertained or an unascertained, but ascertainable, sum, being in the former case called liquidated and in the latter case unliquidated damages.

It is usual in bonds and other specialty contracts to fix the damages for breach of the contract at a liquidated sum. If, however, the sum so fixed is a penal sum, the Courts, both of Law and of Equity, will relieve against the full amount thereof, and allow the injured party to recover only such part thereof as will compensate him. The Courts carry this relief so far that even if the parties to the contract expressly stipulate that the sum fixed as damages shall be regarded as liquidated damages and not as a penalty, the Courts will, if they can find any ground for doing so, hold that the amount so fixed is a penalty, notwithstanding, and will deal with it accordingly. *Kemble v. Farren*, 6 Bing. 141. See also title **PENALTY**.

Where the damages do not even profess to be liquidated, but are left altogether uncertain in the contract (as they necessarily are in cases of tort), then the amount is to be ascertained by the jury, or (in some cases) upon a reference by the referee. But by whomsoever the amount is to be ascertained there are certain particular rules of law which must be observed, the principal of which are the following:—

(1.) In contracts for the sale of goods,—

(a.) If the vendor fails to deliver, then the amount of damages is the difference between the contract price and the market

DAMAGES—continued.

- price of the goods at the time of the breach; and
- (b.) If the vendee refuses to accept, then the amount of damages is the like difference.
 - (2.) Upon breach of a contract to replace stock, the amount of damages is the price of the stock on the day on which it ought to have been replaced or (at the plaintiff's option), its price on the day of the trial;
 - (3.) In an action for the price of goods which have been delivered and received, but which are of inferior quality to that contracted for,
 - (a.) If the full price has been paid, the amount of damages (to be recovered by the purchaser) is the difference between the price given and the actual value of the goods as ascertained by re-selling them; and
 - (b.) If the price has not yet been paid, the amount of damages (to be recovered by the vendor) is the price agreed on *minus* the difference between that price and the actual value ascertained as before.
 - (4.) In the case of a contract of hiring and service, where the breach consists in a wrongful dismissal, the amount of damages is the usual rate of wages in the particular employment, multiplied by the time that will be required for finding new employment of the same character; and
 - (5.) In the case of a contract for the sale of land, where the breach of contract arises from the vendor's failing to make a good title, then,—
 - (a.) If the vendor was unaware at the time of contracting of the defect in his title, the amount of damages is the expense incurred by the vendee in investigating the title, and nothing more (*Flureau v. Thornhill*, 2 W. Bl. 1078); but
 - (b.) If the vendor was aware at that time of the defect of title, then the amount of damages is the expense incurred by the vendee in investigating the title and also damages for the loss of his bargain. *Hopkins v. Grazebrook*, 6 B. & C., 31.

The following distinctions are also taken in respect of damages, viz:—

(1.) Some damages are general and some are special; and the rule of law with respect to the latter class of damages is,

DAMAGES—continued.

that they must be both pleaded and proved, whereas neither of these things is necessary with respect to the former class of damages; for these as being general are implied by the law; and

(2.) Some damages are direct, and some are indirect, remote, or consequential. Now, the law permits no damages as a general rule to be recovered excepting such as are the *natural* consequences, and also the *legal* consequences, of the breach of contract or of the tort (*Vicars v. Willcox*, 2 Sm. L. C. 487); but under special circumstances, if those special circumstances have been pointedly, *i.e.* sufficiently, brought to the knowledge of the offending party, then other damages of a remoter or consequential nature which have arisen from the breach of contract or from the tort, will be recoverable (*Hadley v. Baxendale*, 9 Ex. 341); and it is in respect of this class of damages when they arise from the commission of a tort that the Court is inclined to be more liberal in the amount which it awards. See generally *Mayne on Damages*, by Lumley Smith, 1872.

DAMNUM ABSQUE INJURIA. This phrase denotes the happening of some loss or damage to one person, without any wrong done to him on the part of the person who has caused the loss or damage. A familiar instance of this is the case of a rival schoolmaster who sets up a school near to an existing school, and by so doing draws away by competition merely some or all of the scholars of the latter school. And in the case of one landowner who, by digging a well in his own ground for his own farm, thereby draws off the underground water which supplied a well previously dug in another person's land, we have another instance of a *damnum* unaccompanied with an *injuria* (*Adon v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. Ca. 349). The converse phrase, *injuria sine damno*, is, on the other hand, always actionable, upon the ground that every *injuria* being an interference with another person's right, necessarily and in the very nature of it importeth a *damnum*. *Ashby v. White*, 2 Ld. Raym. 953.

DANBY, IMPEACHMENT OF. The Earl of Danby, minister of Charles II., was cognisant of that sovereign's secret treaty with France, and for his complicity therein was impeached. Upon his impeachment three questions of a technical legal importance were raised:—

(1.) Whether the Lords, upon a mere general charge of treason, were able to commit the accused to prison without bail:—*Held*, that they might.

DANBY, IMPEACHMENT OF—*contd.*

(2.) Whether a minister might plead in bar to an impeachment the fact that the king had subsequently pardoned the offence, if any:—*Held*, that such plea was not so admissible, although the king's pardon after conviction or attainder would be a good deliverance. This opinion was only hesitatingly arrived at on the occasion of Lord Danby's impeachment, and was not finally adopted or declared by the legislature until 13 Will. 3, c. 2 (Act of Settlement).

And (3.) Whether an impeachment abated by a dissolution of Parliament:—*Held*, that an impeachment did not abate upon a prorogation merely, nor yet upon a dissolution. This decision was not, however, final, for the contrary was held in 1685; and it was not till 1717 (in the case of the Earl of Oxford), that a prorogation, and not until 1791 (in the case of Warren Hastings) that a dissolution, was finally declared to be no abatement of an impeachment in parliament.

DANE-GELD, OR DANE-GELD. This means Dane-tribute, and was a tax of 1s. (afterwards 2s.) upon every hide of land throughout the kingdom. It was originally imposed by the Danes, and was afterwards levied for clearing the seas of Danish pirates; sometimes it was applied by way of bribing these pirates to abstain from their invasions. The tax was released by Edward the Confessor, but was again imposed by William I.; it was again released by Henry I., and re-imposed in the form of ship-money by Charles I.

See title **SHIP-MONEY**.

DARREIN PRESENTMENT: *See* title **ASSIZE OF DARREIN PRESENTMENT**.

DAY: *See* title **TIME**.

DEAD FREIGHT. This is freight payable by the charterer of a vessel under his charterparty when the cargo has for some cause not been conveyed as intended.

See title **CHARTERPARTY**.

DEAF AND DUMB. Such persons may lawfully intermarry (*Harrod v. Harrod*, 1 Kay & J. 4); and, if married women, may make acknowledgments (*In re Harper*, 6 M. & G. 732). But their wills are regarded with much suspicion (*In the Goods of Ouston*, 2 S. & T. 461). If deaf, dumb, and blind they are idiots, and have no capacity, *sed quære*.

DEAN. An ecclesiastical dignitary who presides, or originally presided, over ten (*dēca*) canons or prebendaries. He is next in rank to the bishop, and is head of the chapter of a cathedral.

DEAN—*continued.*

A dean and chapter is a spiritual corporation, and forms the council of the bishop, assisting him with advice and management in spiritual matters, and also in the temporal concerns of the diocese.

Deans of the *old* foundation—*e.g.*, St. Paul's—are elected by the chapters of cathedrals upon a *congé d'élire* from the sovereign; deans of the *new* foundation—*i.e.*, deans created by Henry VIII., *e.g.*, Canterbury—are appointed by the letters patent of the sovereign. Deaneries of the former class are thence called *elective*, those of the latter *donative*; but some are *representative*, *i.e.*, in the gift of private patrons.

DEATH. Where a person has not been heard of for seven years, and his absence is not explainable, the law raises a *prima facie* presumption that he is dead (*Hove v. Hasland*, 1 W. Bl. 406); but that presumption does not in any way fix the time of death, of which strict evidence must be given by the party who derives any interest therefrom. *Doe v. Nepean*, 2 Sm. L. C. 510.

DE BENE ESSE: *See* title **EVIDENCE DE BENE ESSE**.

DEBENTURE. Is a security issued by a public company, usually railway company, and which may or may not be a mortgage of the lands and stock of the company. If not mortgages, debentures are not an interest in land within the meaning of the Statute of Frauds (29 Car. 2, c. 3), or within the Mortmain Act (9 Geo. 2 c. 36); but otherwise if they are mortgages (*Toppin v. Lomas*, 16 C. B. 159). Debentures are usually in the form of a promissory note, subject to certain strict regulations as to the mode of transfer, and usually have coupons attached to them to facilitate the payment of interest. The interest on these coupons, although payable half-yearly, accrues due *de die in diem*, and is apportionable like ordinary interest. *In re Rogers*, 1 Dr. & Sm. 338.

See also title **SHARES**.

DEBENTURE STOCK is a species of funded debt contracted by a public company under the authority of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), ss. 22-35, and intended to be applied in discharge of the mortgages or bonds of the company. It carries interest at 4 per cent., and both principal and interest are a charge upon the undertaking of the company, and are prior to all shares or stock of the company. They are personal estate. They do not entitle the holders to vote, or even to be present, at any meeting of the company. To the

DEBENTURE STOCK—*continued.*

extent of the money raised by the issue of debenture stock the borrowing powers of the company are extinguished.

DEBT. This means a sum of money due by some certain and express agreement, *e.g.*, on a bond, bill of exchange, &c., where the amount is determinate, and for the non-payment thereof an action of *debt* will lie.

Debts are of various kinds, namely:—

(1.) *Judgment debts*, as to which *see* title **JUDGMENT DEBTS**.

(2.) *Specialty debts*, as to which *see* title **SPECIALTY DEBTS**.

(3.) *Simple contract debts*, as to which *see* title **SIMPLE CONTRACT DEBTS**.

Originally debts were not payable out of real estate, but only out of personal estate. For it appears that—

Anciently there was only one mode by which lands might become liable for the debts of the tenant, namely, by the tenant giving a bond specially binding his heir as well as himself. This of course he could not do until the power of alienation by deed *inter vivos*, so as to defeat the heirs, became established (*see* title **ALIENATION**); but the power to execute a bond of that sort is expressly recognised in Britton, who wrote in the reign of Edward I. But this specialty debt, as it was called, was only available against such part of the debtor's land as descended to his heir; and the word "heirs" did not include for this purpose the word "devisee" until the stat. 6 & 7 Will. 3, c. 14 (the Statute of Fraudulent Devises) was passed, so that, until the last-mentioned statute the obligor, after binding his heirs, might, by devising the lands away from his heirs, have defeated the obligee of his remedy. Such was the liability of the lands of a debtor after his decease. During the life of the debtor the lands were not liable at all, unless in virtue of judicial proceedings taken against the tenant, the debtor. It was necessary to enter up judgment against the debtor for the amount of the debt; and the creditor becoming a judgment creditor was enabled by the stat. 13 Edw. 1 (Statute of Westminster the Second), c. 18, to obtain an *elegit*, whereby he might take one moiety of the lands of the debtor, and satisfy himself his debt thereout. *See* titles **ELEGIT**; **JUDGMENT DEBTS**.

After the right of testamentary alienation became established (*see* title **ALIENATION**), it was competent to a debtor to charge his lands with the payment of his debts; and in the Court of Chancery such a charge was construed to extend to debts arising out of simple contract, as well as by specialty, so that all debts were payable

DEBT—*continued.*

out of the land rateably according to their respective amounts.

And the present liability of lands to the payment of debts is as follows:—

(1.) During the lifetime of the debtor—Upon entering up judgment, and duly registering same, execution may be sued out and registered, and under that execution lands, whether freehold, copyhold, or leasehold, and whether legal or equitable, may be taken possession of and sold in satisfaction of the debt. *See* title **JUDGMENTS**.

(2.) After the decease of the debtor. By the stat. 3 & 4 Will. 4, c. 104, it is enacted that the lands of a deceased person shall be assets in Equity for payment of all his just debts, as well owing by simple contract as by specialty.

See title **ADMINISTRATION OF ASSETS**.

See also title **CROWN DEBTS**.

DECEIT. This is *fraud*, as to which *see* title **FRAUD**.

A writ of deceit used formerly to lie, and now an action on the case in the nature of a writ of deceit lies, where the plaintiff has received injury or damage through the *deceit* of the defendant or of his agent, where the defendant was privy thereto.

See also titles **MISREPRESENTATION**; **WARRANTY**.

DECENNARY. A tithing or civil division of the country composed of ten freeholders with their families. The institution was introduced, it is believed, by the earliest Saxon settlers in England, and some say by Alfred. The members of a tithing were mutually responsible for each other's good behaviour (*see* title **FRANKPLEDGE**). Ten decennaries formed a *hundred* (*see* title **HUNDRED**).

DECENNIERS. Persons having the oversight of ten free burghs (Holthouae), or possibly only of ten free households (Tomlins), for the conservation of the king's peace therein, with power to try causes and give redress by judgment, and for these purposes to administer oaths.

DECLARATION. At Law is a pleading which corresponds to the bill of complaint in Equity. It contains a succinct statement of the plaintiff's case, and generally comprises the following parts:—

- (1.) *Title* { In the Queen's Bench,
and *date* { the 10th July, 1874;
- (2.) *Venus*.—Middlesex, to wit;
- (3.) *Commencement*.—A. B. by C. D.,
his attorney [or in person], sues
E. F. for
- (4.) *Body of declaration*.—consisting of
the following parts (which, how-

DECLARATION—*continued.*

ever, are not all necessary in every form of action) viz. :—

- (a.) *Inducement*,—being introductory merely, and rarely requiring proof;
- (b.) *Averments*,—being usually the allegation of the performance of all precedent conditions, &c., on the plaintiff's part; and
- (c.) *Counts*,—containing statement of defendant's breach of contract or other injury;
- (5.) *Conclusion*,—"And the plaintiff claims £—"

The time for the plaintiff to declare is immediately after the defendant has appeared; if the plaintiff do not declare within one year after the writ of summons is returnable, he is deemed out of Court. But the defendant may at the end of the term next after his appearance give the plaintiff four days' notice to declare, and thereafter, upon default of the plaintiff's declaring within the time limited for that purpose, may sign judgment of *non pros* against him. See Bull. & L. Pl. 1.

DECLARATORY ACT. This is an Act which, by profession, at least, declares no new law, but only the formerly existing law, removing certain doubts which have arisen on the subject; e.g., the Statute of Treasons, 25 Edw. 3, stat. 5, c. 2, professes to create no new treasons, but only to enumerate the already existing treasons. See title **STATUTES**.

DECREE. This is the judgment of a Court of Equity, and is to most intents and purposes the same as a judgment of a Court of Common Law. A decree as distinguished from an *order* is final, and is made at the hearing of the cause, whereas an *order* is interlocutory, and is made on motion or petition; wherever an *order* may, in a certain event resulting from the direction contained in the *order*, lead to the termination of the suit in like manner as a decree made at the hearing, it is called a *decreeal order*.

DECRETAL ORDER: See title **DECREE**.

DECRETALS. These are the papal decrees of various popes as the same were collated in five books by Pope Gregory IX., whence also they are called *Decretalia Gregorii Noni*, about the year 1230. A sixth book (called *Sextus Decretalium*) was added by Pope Boniface VIII. about the year 1298.

See title **CANON LAW**.

DEDI. The proper word (give) in a deed of feoffment, and implying formerly

DEDI—*continued.*

a warranty of title, but implying no such warranty at the present day, since 8 & 9 Vict. c. 106.

DEDIMUS POTESTATEM. A writ issuing out of Chancery empowering certain persons therein named to perform certain acts; as when a justice of the peace appointed under the king's commission intends to act under this commission, a writ of *dedimus potestatem* issues, empowering certain persons therein named to administer the usual oaths to him, which being done, he is at liberty to act. Lamb. 23.

DEDIMUS POTESTATEM DE ATTORNATO FACIENDO. At Common Law the parties in an action were obliged to appear in Court in person, unless allowed by a special warrant from the Crown (bearing the above title) to appoint an attorney; or unless after appearance they had appointed a deputy, called a *responsalis*, to act for them, and which the Court allowed them to do in some instances. But now a general liberty is given to parties in an action to appear by attorney, excepting in the cases of infants, idiots, and married women. F. N. B. 25; 1 Arch. Pract. 84.

DE DONIS. This is the name of a celebrated statute (13 Edw. 1, or Statute of Westminster the Second, c. 1), in virtue of which an estate in freehold lands, which was formerly known as a *donum conditionale* (whence the name of the statute), was converted into an estate tail, and required to descend according to the formdon (*formam doni*), so as to be inalienable as well against the lord in prejudice of his reversion as against the issue in prejudice of their succession. A *donum conditionale*, on the other hand, was alienable, immediately upon the birth of issue, that being construed as the condition of the gift (whence the name); the condition being discharged, the estate, of course, became absolute.

See title **ESTATE TAIL**.

DEEDS. These are of two kinds, being either deeds-poll or indentures.

(1.) A deed-poll was a bald or shorn deed, and was made by one person only, beginning with the words, "Know all men," &c. Under such a deed, any person may accept a grant.

(2.) An indenture was an indented deed, and was made between two or more parties, beginning with the words, "This indenture," &c., and stating the parties at the outset. Formerly no person who was not a party could take any *immediate* estate, interest, or benefit under such a deed; but now, by the 8 & 9 Vict. c. 106, such an

DEEDS—continued.

estate, interest, or benefit may now be taken under it by a person not a party to it.

A deed may be made either on paper or on parchment.

DEER. Deer in a park when reclaimed become personal chattels, and cease to be parcel of the inheritance. *Ford v. Tynle*, 2 J. & H. 150; *Morgan v. Abergavenny (Earl)*, 8 C. B. 768.

By the stat. 24 & 25 Vict. c. 96, s. 12, it is made a criminal offence to wilfully course, hunt, snare, or carry away, or kill, or wound deer in an uninclosed forest, the penalty for a first conviction not to exceed £50, and for a second or other subsequent offence imprisonment not exceeding two years, with or without hard labour. Doing the like to deer in inclosed ground is punishable even for a first offence with the like imprisonment (s. 13). Setting engines for taking or killing deer, whether in an uninclosed or in an inclosed place is punishable with a fine not exceeding £20.

DE FACTO. A king *de facto* is one actually reigning, as opposed to one *de jure* merely, who, although having the lawful succession, has either been ousted from, or never actually taken, the possession of the sovereignty. The constitutional statute, 11 Hen. 7, c. 1, enacts that obedience to the king for the time being *de facto* shall be a protection to the subject against all forfeitures under any succeeding sovereign claiming adversely.

See also title ALLEGIANCE.

DEFAMATION: See title LIBEL.

DEFAULT, JUDGMENT BY. Where a defendant omits to appear, or (having appeared) to plead or to put in his answer to an action or suit within the time or times limited for either of these purposes by the Courts, and he has obtained no enlargement or extension of the time for doing so, it is presumed that he has no defence, and the plaintiff is thereupon entitled to sign judgment against him. Either:—

(1.) For the non-appearance, if the writ has been specially indorsed; s. 27, C. L. P. Act, 1852; or,

(2.) For want of plea, if the writ has not been specially indorsed; s. 28, C. L. P. Act, 1852.

Moreover, by s. 93, C. L. P. Act, 1852, when the plaintiff in any action seeks to recover a debt or liquidated demand in money, judgment by default is final; and by s. 94 of the same Act, where he seeks to recover an unliquidated sum, the ascertainment of which is merely matter of calculation, the Court directs the master to ascer-

DEFAULT, JUDGMENT BY—continued.

tain the amount, without reference to the distinction between *debt* and *damages*, but the judgment is in the meantime interlocutory only. Of course, where the ascertainment of the damages is not merely matter of calculation, the jury must find the amount: and, *semble*, there is no judgment at all (by default or otherwise) until the jury have so found.

Judgment by default is also sometimes called judgment by *Nil dicit*.

DEFEASANCE: See title CONVEYANCES.

DEFENCE: See titles PLEA; JUSTIFICATION.

DEFORCEMENT. This is the holding of any lands or tenements wrongfully as against any person who has the right thereto but who has not as yet at any time been in the possession thereof; e.g., where a lessee for years or *pur autre vie* holds over after the determination of his interest and refuses to deliver up the possession to the reversioner or remainderman. But when such a tenant holds over without any such refusal to deliver up, he is not a deforciant, but only a tenant by sufferance. The deforciant must have come in by right in the first instance; for if the person wrongfully holding came in by wrong in the first instance, he is not a deforciant, but either,

- (1.) An intruder: see title INTERUSION;
- (2.) A disseisor: see title DISSEISIN; or,
- (3.) An abator: see title ABATEMENT.

Deforcement in respect that the deforciant comes in by right in the first instance is like *discontinuance*, as to which see title DISCONTINUANCE.

DEGRADATION. This phrase was applied: (1.) To the case of a peer deprived of his nobility, e.g., the case of the Duke of Bedford, of Edward IV.'s reign, who was deprived by that sovereign on account of his poverty. And at the present day, a peer who becomes bankrupt ceases for the time being to be capable of sitting in the House of Lords (Bankruptcy Disqualification Act, 1871). (2.) To the case of an ecclesiastic who is divested of his holy orders; degradation is a greater punishment than deposition, being not merely the displacing one from his office (which deposition also is) but also the divesting him of all his badges of honour, privileges, &c. (which deposition is not).

DE INJURIA, REPLICATION. This was a form of taking issue, but which has been superseded by the C. L. P. Act, 1852, s. 79. The exact nature of the form may be col-

DEMURRAGE—*continued.*

If the ship after sailing puts back owing to contrary winds, and is detained in port by frost or bad weather, no demurrage is payable for that unavoidable delay; and when the ship is to be unloaded in the usual and customary time, no demurrage is payable for a detention caused merely by the crowded state of the docks (*Jamieson v. Laurie*, 6 Bro. P. C. 474; *Burmester v. Hodgson*, 2 Camp. 488). Where, however, the parties enter into a positive contract, that the goods shall be taken out of the ship within a specified number of days from her arrival, as such a contract is construed strictly, demurrage is payable for any delay beyond the specified period, although the shipper is powerless to remove the causes of the delay, provided only the shipowner is not to blame. *Randall v. Lynch*, 2 Camp. 352; *Bessey v. Evans*, 4 Camp. 131.

The contract to pay demurrage, which is contained in the charterparty, is made between the shipowner and the shipper, and the latter is therefore the person liable to pay the demurrage; but where, as is usually the case, the bill of lading mentions the demurrage, a consignee who accepts the goods under it may, and generally does, become liable for it on a new contract, to be implied from his acceptance of the goods under these circumstances; and such implied contract may arise, although the receiver at the time of receiving the goods states that he will not pay demurrage (*Smith v. Sieveking*, 4 E. & B. 945). But a mere reference in the bill of lading to the terms of the charterparty, in which demurrage is specified, will not of itself render the consignee receiving the goods liable for demurrage. *Smith v. Sieveking*, *supra*.

DEMURRER. In pleading, is the formal mode of disputing the sufficiency in law of the pleading of the other side.

Before the C. L. P. Act, 1852, demurrers were either general or special; but by s. 51 of that Act, special demurrers were abolished. There is now therefore but one kind of demurrer, namely, the general demurrer, which is admissible under s. 50 of the C. L. P. Act, 1852, but only when the pleading of the opposite party is bad in substance; for if the pleading is bad for argumentativeness, generality, repugnance, duplicity, or other like reason not also amounting to matter of substance, it is to be objected to under s. 52 of the C. L. P. Act, 1852, by summary application to the Court to strike out or amend. Under s. 89 of the same Act, the form of a demurrer is this:—

"The defendant [or "the plaintiff," as the case may be], by his attorney [or

DEMURRER—*continued.*

"in person," as the case may be] says that the declaration [or "the plea," &c., as the case may be] is bad in substance." And in the margin of the demurrer book the matter of law intended to be relied on is to be stated. The other side may thereupon join in demurrer in this form:—"The plaintiff [or "the defendant," as the case may be] says that the declaration [or "plea," &c., as the case may be] is good in substance."

Before the C. L. P. Act, 1862, a party was not at liberty both to plead and to demur to the same pleading; but by s. 80 of that Act, he may by leave of the Court now do so upon affidavit, which however is seldom required.

In Chancery, whenever the statements contained in a plaintiff's bill of complaint (assuming them all to be true as stated) are insufficient to entitle him to the relief prayed, the defendant may demur to the plaintiff's bill, either to the relief (which would include the discovery) sought, or to the discovery alone (exclusive of the relief). The most usual grounds of demurrer are the following:—

- (1.) Want of equity, whether
 - (a.) In respect of the subject matter; or
 - (b.) In respect of the plaintiff personally; or
 - (c.) In respect of the defendant personally;
- (2.) Want of parties;
- (3.) Multifariousness; and
- (4.) Insufficiency in Law of case made by plaintiff.

This fourth ground being analogous to the ground commonly taken at Law.

The demurrer, as to its form, commences with a formal protestation of the falsehood of the statements in plaintiff's bill, and then demurs to the bill, or to the part of it which it specifies, for the cause which it also specifies, concluding with a general allegation of other good causes of demurrer, and praying to be dismissed from the suit with costs, and without being compelled to answer the plaintiff's bill.

Twelve days after the date of his appearance to the bill is allowed the defendant for demurring alone; and twenty-eight days if he demur as to part, and plead or answer as to the rest.

The demurrer must be filed; and within three weeks after the filing thereof, it may be set down for argument.

In case the demurrer is allowed, it puts the plaintiff wholly out of Court, unless he obtains leave to amend; on the other hand if the demurrer is overruled, the defendant is obliged to put in his full defence by answer.

See titles ANSWER; PLEA.

DENIZEN. A denizen is an alien by birth, who has obtained, *ex donatione regis*, letters patent making him an English subject. The king may denizenize but not naturalize a man, the latter requiring the consent of Parliament, either *pro re natâ* or under a general Act, such as the Naturalization Act, 1870 (33 & 34 Vict. c. 14). A denizen holds a middle position between an alien and a natural born or naturalized subject, being able to take lands by purchase or devise (which an alien could not until 1870 do), but not having been able to take lands by descent (which a natural-born or naturalized subject may do).

See also titles ALLEGIANCE; ALIENS; NATURALIZATION.

DEODAND. Any personal chattel that is the immediate occasion of the death of any reasonable creature, and which by reason thereof precisely is forfeited to the king, to be applied to pious or charitable uses,—being in Roman Catholic countries, the expiation by masses, and otherwise, of the sins of the deceased; and in Protestant countries, the relief of the deserving poor. Where the person killed is an infant under the age of discretion, no deodand arises, there being in his case no sins of commission to expiate.

DEPARTURE. In pleading, where a man departs from one line of defence, and has recourse to another line of defence either inconsistent with or not confirmatory of his former defence, this is called a departure, and the effect of it is to render the entire pleading demurrable. *Bartlett v. Wells*, 1 B. & S. 836.

DEPOSIT: See title BAILMENT.

DÉPÔT. In French law, is the *depositum* of Roman and the deposit of English Law. It is of two kinds, being either (1.) *Dépôt* simply so called, and which may be either voluntary or necessary; and (2.) *Séquestre*, which is a deposit made either under an agreement of the parties, and to abide the event of pending litigation regarding it, or by virtue of the direction of the Court or a judge, pending litigation regarding it.

DEPOSITION. This word is used generally to denote any affidavit on oath, or solemn affirmation in lieu thereof. But it is more commonly used in a more particular sense, as meaning,—a statement written down by an officer of the Court (called an examiner in Chancery), embodying the substance of the answers obtained from the deponent in the course of his examination. It is competent for either party to a suit which is intended to be heard upon motion

DEPOSITION—continued.

for decree to examine his own unwilling witness in this way, but only upon notice to the other side, who then and there may cross-examine the deponent, the side who have called him in that case re-examining him. Also, in a suit in which replication has been filed, such depositions may be taken, but in this case *ex parte*. In either case the deposition is to be regarded as the reluctant affidavit of the deponent.

Depositions are also taken before magistrates for the purposes of a criminal prosecution; and in case the deponent should die before the trial, or be too ill to attend, these depositions may be used in evidence, subject to certain restrictions mentioned in the stat. 11 & 12 Vict. c. 42.

DEPRIVATION: See title DEGRADATION.

DERELICT. Anything thrown away or abandoned, with the intention of quitting the ownership thereof. Goods thrown out of a vessel to lighten same in time of distress are not derelict, for want of the intention. See Just. Inst. ii. 1, 48.

DESCENDER.—Writ of formedon in tail, having aliened the land otherwise than by fine or common recovery, or having been disseised thereof, died, and the heir in tail claimed to recover the land as against the person in possession thereof under the alienation or disseisin.

DESCENT. Where the title to land vests in any one by mere operation of law, such title is said to vest in him by descent. As thus used, the term is distinguished from purchase, which may be either *decise* or *grant*.

See also next title.

DESCENTS. Estates descend from ancestor to heir, as the blood trickles.

The following stages in the growth of the present law of descents may be indicated:—

- (1.) Fee simple estates were originally confined to the issue or lineal descendants of the ancestor;
- (2.) By the reign of Henry II., collateral descendants were admitted to the succession upon the failure of lineals;
- (3.) By the time of Henry III., *primogeniture*, i.e., descent to the eldest son in exclusion of the others, was established;
- (4.) By the time of Henry III., the doctrine of representation was established, whereby the issue of the eldest son who was dead stood in his place, to the exclusion of the

DESCENTS—continued.

other sons (being the uncles of such issue);

- (5) In the year 1833, the lineal ancestors were as such rendered capable of being heirs;
- (6) In the year 1833, the half-blood of the purchaser became admissible to succeed as heir; and
- (7) In the year 1859, the widow of the purchaser became admissible to succeed as heir.

The following are the canons which at present regulate the descent of lands:—

- (1) The inheritance is to descend to the lineal descendants of the purchaser *in infinitum* (see title **PURCHASER**);
- (2) And to the male issue in preference to females;
- (3) And to the eldest male issue in exclusion of the others (see title **PRIMOGENITURE**); but if there are no male issue, then to the female issue altogether (see title **CO-PARCEENERS**);
- (4) Lineal descendants *in infinitum* are to represent their ancestor (see title **REPRESENTATION**);
- (5) Failing lineal descendants of the purchaser, the inheritance is to go to the nearest lineal ancestor, the father succeeding before the brother or sister of the purchaser, and every more remote ancestor succeeding before his issue other than any less remote ancestor or ancestors, and his or their issue;
- (6) In the application of the 5th canon, the succession is to be according to the following order,—
 - (a.) The father and all male paternal ancestors and their descendants *in infinitum*;
 - (b.) All the female paternal ancestors and their heirs;
 - (c.) The mother and all male maternal ancestors, and her and their descendants *in infinitum*; and
 - (d.) All the female maternal ancestors and their heirs;
- (7) The half-blood of the purchaser shall inherit,—
 - (a.) Where the common ancestor is a male, next after a kinsman in the same degree of the whole blood, and the issue of such kinsman *in infinitum*; and
 - (b.) Where the common ancestor is a female, next after that female;
- (8) In the application of the 6th canon,—
 - (a.) In the admission of female paternal ancestors, the mother of the more remote male paternal an-

DESCENTS—continued.

cestor and her heirs are to be preferred to the mother of the less remote and her heirs; and

- (b.) In the admission of female maternal ancestors, the mother of the more remote male maternal ancestor and her heirs are to be preferred to the mother of the less remote one and her heirs;
- (9.) Failing the discovery of an heir after the application of all the first eight canons, the land is to descend to the heir of the person last entitled, although he was not the purchaser thereof; and such heirs will of course have to be ascertained by the renewed application of the first eight canons, starting only from a different point of departure, or *propositus*.

DESIGNS, COPYRIGHT IN: See title **COPYRIGHT**.

DE SON TORT DEMESNE. These are words which were commonly used in the replication to a defendant's plea in an action of trespass *quare clausum fregit* as thus:—A. sucs B., B. pleads that he committed the alleged trespass by the command of X.; A. replies that B. did it *de son tort demesne, sans ceo que X. lui commanda modo et formâ*. Since the cases of *Trevilian v. Pyne* (Salk. 107), and *Chambers v. Donaldson* (11 East, 65), the alleged command has been traversable in pleading; and by the C. L. P. Act, 1852, s. 77, a plaintiff is at liberty to traverse the whole of any plea or subsequent pleading of the defendant by a **GENERAL DENIAL** (in the form "The plaintiff takes issue, &c."), or admitting some part or parts thereof to deny all the rest, or to deny any one or more allegations; so that the plea *de son tort demesne, semble*, is now superfluous.

DETAINDER. This word was used in two kindred senses; firstly, it signified the forcibly keeping another out of possession of lands or tenements, an injury which was not only of a civil nature, entitling the dispossessed party to damages, but also of a criminal nature, rendering the dispossessor liable to a fine to the king for his breach of the king's peace. Compare in Roman law the *Lex Julia de Vi*. Secondly, it signified a writ which lay against persons imprisoned in the Marshalsea or the Fleet, and which was directed to the marshal or warden (as the case might be), and directed him to *detain* the prisoner in his custody until he should be lawfully discharged therefrom. In this latter sense, *detainer* is become obsolete, in consequence of the Debtors' Act, 1869 (32 & 33 Vict. c. 62).

DETERMINATION. This word, as used in Law, denotes the ending or expiration of any estate or interest in property; *e.g.*, an estate during widowhood determines upon re-marriage, and an estate during minority upon attaining twenty-one years of age, and so forth.

DETINUE. An action which lies for the recovery of goods wrongfully detained by any one; *e.g.*, for a horse lent. The judgment in this action is, that the plaintiff (when successful) do recover the articles or their value, together with the damages and costs found by the verdict, and the costs of increase (see title **INCREASE**, **COSTS** or). Prior to the C. L. P. Act, 1854, the defendant had the option either to pay the value or restore the goods, but now, by s. 78 of that statute, such option belongs to the plaintiff, who, upon application to the Court or a judge, may (at the discretion of the Court or judge) have execution for the goods detained, enforceable by distress. But Courts of Equity could always upon bill filed order the delivery up of chattels improperly detained, *e.g.*, deeds, court rolls; also, old family pictures, horns, snuff-boxes, &c. *Fells v. Read*, 3 Ves. 70.

DEVASTAVIT. In an action against an executor or administrator, where the plaintiff has obtained judgment that he do recover his debt and costs out of the assets of the testator (if any), and, failing these, do recover his costs out of the executor or administrator's own goods, the usual writ of execution is a *fi. fa. de bonis testatoris*; but if the sheriff return to this *nulla bona testatoris nec propria*, AND a *devastavit*, the plaintiff may forthwith upon the return sue out a *fi. fa. de bonis propriis*, or (at his election) an *elegit* or a *ca. sa.* against the property or the person of the executor or administrator, in as full a manner as in an action against him in his own right. A *devastavit* is therefore strictly such a return by the sheriff; however, the word is commonly employed in the general sense of wasting the goods of the deceased, or in Equity in the sense of a breach of trust or misappropriation of the assets.

DE VENTRE INSPICIENDO. Where a widow is suspected of feigning herself with child, the heir may have a writ *de ventre inspiciendo*, to examine her womb whether it be as feigned or not; and in case her womb be as feigned, the heir may until her delivery keep her under *surveillance*.

DEVISAVIT VEL NON. This was an issue directed not unfrequently by the Court of Chancery, to be tried before a

DEVISAVIT VEL NON—continued.

jury at Common Law; and a like issue may be tried by that Court itself at the present day in a proper case. The object of the issue is to ascertain whether or not certain properties are comprised within a devise which appears *prima facie* not to comprise them. A proper case for such an issue was that of *Newburgh v. Newburgh*, 5 Madd. 364.

DEVISE. This word meant originally to *divide* or distribute property, but it is now used exclusively to signify the giving of real estates by will, the testator being called the deviser, and the object of his bounty the devisee. The word "devise" is properly applicable to real estate only, while the word "bequeath" is properly applicable to personal estate only; and upon the strength of the word "devise" alone, an intention has been found to pass real property, which nothing else in the will seemed to indicate: see *Coard v. Holderness*, 20 Beav. 147.

DICTUM. Called also *obiter dictum*, or "remark by the way," is a remark more or less casual dropping from a judge with respect to the law in matters like that at the time before him.

DIES NON JURIDICUS. A day on which the Courts, for reasons of religion, do not sit; *e.g.*, Good Friday, Sunday, and the like. In Roman Law it is called *dies nefastus*. The days on which the Courts may sit are called *dies juridici*, and in Roman Law were called *dies fasti*. Vacations are non-court days for a very different reason, namely, the health of the judges, counsellors, and officers.

DIET. A legislative assembly; *e.g.*, the Diet of Frankfurt.

DIEU ET MON DROIT ("God and my right"). This is the motto of the royal family, and is said to have been first used by Richard I. It signifies that the sovereignty is subject only to the divine and not to any human law. But it is no pretext either for absolutism on the one hand, or for the subjection of the State to the Church on the other.

DIGNITIES. These are titles of honour; and having been originally annexed to land, they are considered as real property. 1 Cru. 55.

DILAPIDATIONS. This word denotes generally letting a house get into bad repair, and is applicable generally to all tenants who are under a covenant to repair (see title **WASTE**). But it is more peculiarly applicable to the bad repair of

DILAPIDATIONS—*continued.*

ecclesiastical residences, the Ecclesiastical Law enabling a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor, or (if he should be still living) against the predecessor himself.

DILATORY PLEAS: *See* title **ABATEMENT, PLEAS IN.**

DIRECTING THE JURY: *See* title **JURY.**

DISABILITY. This means any incapacity either of acquiring or of transmitting a right, or of resisting a wrong. Such disability may arise either from the act of the party, or from the act of his ancestor, or from the act of law, or from the act of God. (1.) From the act of the party,—as where, after having agreed upon the surrender of an old lease to grant a new one, he grants the reversion to another, whereby he incapacitates himself to grant the new lease: (2.) From the act of the ancestor,—as where he was attainted or convicted of treason or felony, whereby formerly he rendered his children incapable of inheriting: (3.) From the act of law,—as where (prior to 1870) he was an alien born, whereby, or in consequence thereof, the law struck him with a general incapacity to hold lands; and (4.) From the act of God,—as where he is a lunatic or idiot, and incapable therefore generally of contracting.

DISBAR. To deprive a barrister permanently of the privileges of his position. It is analogous to striking an attorney off the rolls. Being an extreme measure, it is more common to suspend than to disbar.

DISCLAIMER: *See* **CONVEYANCES.**

DISCONTINUANCE. This phrase is applied to the cessation of an estate or of an action. As applied (1.) to the cessation of an estate, it arises when he who hath an estate tail maketh a larger estate of the land than by law he is entitled to do, in which case the estate is good, but so far only as his estate extends who made it, e.g., if tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail—all which are beyond his power to make—and if the feoffee having entered (as lawfully he may) during the life of the feoffor, retains the possession after the death of the latter, the injury which he does by such retention is a discontinuance of the legal estate of the heir in tail.

As applied (2.) to the cessation of an action, it is somewhat similar to a nonsuit; for when a plaintiff makes a break in the proceedings by not continuing the

DISCONTINUANCE—*continued.*

process regularly from day to day or from time to time, as he ought to do, the defendant is no longer bound to attend, but the suit is discontinued, and the plaintiff must pay the defendant his costs before he recommences his action. However, by rule 31 T. T. 1853, "no entry or continuances by way of imparlance, *curia advisari vult*, *viocomes non misit breve*, or otherwise, shall be made on any record or roll whatever, or in the pleadings." On the other hand, if the plaintiff find that he has misconceived his action, or that for some defect in the pleadings, or other reason, he is not able to maintain it, he may either, upon application at the proper office of the Court, or upon motion to the Court itself, obtain a rule for leave to discontinue upon the terms of paying the defendant his costs. After a discontinuance, a plaintiff may commence a new action for the same cause; and therefore the Court, in many cases of hard actions, refuses leave to discontinue (*Boucher v. Lawson*, Hardw. 200); as it also does after a peremptory rule for judgment on demurrer. *Turner v. Turner*, 1 Salk. 179.

DISCOVERY. By the Common Law, neither party to an action was required to make discovery to the other of any documents or circumstances which might be useful in evidence; and an application required to be made to the Court of Chancery, which would in certain cases, upon a bill of discovery being filed, decree that the defendant thereto should make a particular discovery to the plaintiff. But, at the present day, bills of discovery are become unnecessary; for, in the Court of Chancery, discovery of documents may be obtained under the Jurisdiction Act, 1852, by summons at Chambers; and, under the stats. 14 & 15 Vict. c. 99, and 17 & 18 Vict. c. 125, discovery may now also be had at law. There are also numerous particular provisions in those statutes regarding discovery by means of interrogatories.

See title **INTERROGATORIES.**

DISENTAILING ASSURANCE. By the stat. 3 & 4 Will. 4, c. 74, which abolished the ancient Fines and Recoveries, whereby formerly (amongst other things) an estate tail might be barred, there was substituted a new assurance, called a disentailing assurance, which was calculated to produce the same effect. By this assurance, which is in the form of a simple indenture, but which requires to be enrolled within six months of its execution in the Court of Chancery, the tenant in tail (with or without the consent of the protector, *see* that title, when there is any such) conveys the lands

DISENTAILING ASSURANCE—*contd.*

to a middle man (or man of straw), to the use of himself, the tenant in tail, his heirs and assigns, by which means, and under the Statute of Uses, he instantly emerges a legal tenant in fee simple. It is usual (but not apparently necessary) to add, that the object of the assurance is to dock and bar the entail and all remainders, &c. Where there is a protector, and he refuses to concur, the disentailing deed has the effect of a *fine* only, but otherwise it has the effect of a *common recovery* (see these two titles).

DISFRANCHISE. To deprive of certain privileges, freedoms, or franchises.

See title ENFRANCHISE, which is the opposite.

DISHONOUR, NOTICE OF: See title BILL OF EXCHANGE.

DISPAUPER. When a poor person has been admitted to sue in *forma pauperis*, and through the subsequent acquisition of property or any other sufficient cause it is proper that he should be deprived of the privilege of suing in that quality, then he is deprived of the privilege accordingly; in other words, he is *dispaupered*.

DISPENSING POWER. The early English sovereigns, in imitation of the Popes of Rome, had assumed to dispense with the laws by issuing proclamations and making grants "*non obstante* any particular law to the contrary." This assumption was odious to the Common Law. Thus, in the reign of Henry III., in a suit between the Bishop of Carlisle and a certain baron, the king having resorted to his dispensing power in favour of the bishop, and afterwards in favour of the baron, the chief justiciary complained of the introduction of ecclesiastical maxims into the Civil Courts; and in the same reign, the king having referred to the practice of the popes in vindication of his use of the clause *non obstante*, the Master of the Hospitallers exclaimed, "God forbid that your majesty should utter such a graceless speech."

The practice, notwithstanding, continued to be exercised, and in some reigns more extensively than in others. In particular the exercise of the power by Richard II. is said to have been such as to set aside the very principles of the statutes dispensed from; but the more usual practice was to dispense in particular cases only of an exceptional character. It was the opinion of Lord Coke (Case of *Non Obstante*, 12 Rep. 30) that no Act of Parliament could bind the king from any prerogative that was inseparable from his person, so as that he might not dispense with the statute by *non obstante*. But the true nature and

DISPENSING POWER—*continued.*

limits of the king's right of dispensing with statutes was not fully understood until the case of *Thomas v. Souvell*, decided in 1666, and reported in Vaughan. The plaintiff in that case was a common informer, who brought his *qui tam* action against the defendant (a vintner) to recover his share of a penalty under the stat. 7 Edw. 6, c. 5, incurred by the defendant in selling wine by retail without a licence, in the county of Middlesex. It was found, on special verdict, that James I., who incorporated the Company of Vintners in the City of London, had given them licence in the letters patent of their incorporation to sell wine by retail or in gross within the city and its suburbs, "*non obstante* the statute of Edw. VI." The judgment given was to the effect that the king was able to dispense in some cases and not in others, and that the distinction between the two classes of cases did not depend (as had at one time been said) upon whether the act prohibited by the statute was *malum in se* or *malum prohibitum* only, but that it depended upon whether the king himself was the only person affected by it or whether his subjects also were affected by it. He could dispense with his own privileges, but not with his subjects' rights.

Clearly, therefore, the practice or privilege of dispensing was considered as being not in itself wrong, but only wrong in the abuse of it. Such abuse was again illustrated in 1685, in the case of *Golden v. Hales*, James II. having in that case dispensed with the Test Act in favour of the defendant upon his appointment to a military office, and in express fraud, not only of the Test Act itself, but also of successive resolutions of parliament confirmatory of the Act. In the Bill of Rights (1 W. & M. sess. 2, c. 2), it is accordingly declared, with reference evidently to James II., that the dispensing power *as of late* exercised was illegal, thus indicating at once the legitimate use and the illegal abuse of that prerogative. In the recent *Case of Eton College*, 1815, it was held that a dispensation of Elizabeth granted to the fellows of Eton College to hold ecclesiastical preferment together with their fellowships, notwithstanding a statute of Henry VI. to the contrary, was a legitimate exercise of the dispensing power.

DISSEISIN. When one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands, this is termed a disseisin, being a deprivation of that actual seisin or corporal possession of the freehold which the tenant before enjoyed. In other words, a disseisin is said to be when one enters

DISSEISIN—continued.

intending to usurp the possession, and to oust another from the freehold. Therefore *querendum est à iudice quo animo* he entered. To constitute an entry a disseisin, there must be an ouster of the freehold, either, first, by taking the profits; or, secondly, by claiming the inheritance (1 Cruise, 60). He who so enters and puts a party out of possession of the freehold is termed the disseisor. Litt. 279.

DISSENTERS. The stat. 1 Will. & M. sess. 1, c. 18 (Toleration Act), s. 4, exempted persons taking the oaths and subscribing the declaration therein mentioned from all prosecutions in the Ecclesiastical Courts for nonconformity; and it was held in *Barnes v. Shore* (8 Q. B. 640), that this provision extended not only to lay persons, but to clergymen who, after being ordained, dissented from the Church. For disturbing a Dissenting congregation each offender is liable to a penalty of £20. A Jewish synagogue is not at the present day an illegal establishment. *Israel v. Simmons*, 2 Stark. 356.

Dissenters, in respect of their religious worship have as full a right as Churchmen to the protection of the Courts (*Rex v. Wroughton*, 3 Burr. 1683); and a mandamus will lie to register and certify a dissenting meeting-house (*Rex v. Derby (Justices)*, 4 Burr. 1991); also to compel the trustees of a meeting house to admit a Dissenting teacher. *Rex v. Barker*, 3 Burr. 1265.

DISSOLUTION: See titles PARLIAMENT; PARTNERSHIP.

DISTANCE. Is to be measured in a straight line as the crow flies (*Lake v. Butler*, 5 El. & Bl. 92). And where the trustees of a turnpike road were prohibited by a local Act of Parliament from erecting any toll-gate within three miles of Bargate in the town of Southampton, it was held that the distance was to be measured by a straight line and not by the road (*Jewell v. Stead*, 6 El. & Bl. 350). See also *Duignan v. Walker*, 1 Johns. 446 (an injunction case).

DISTRESS. A power of distress may belong to a landlord either in virtue of express words conferring it, or in virtue of the general law. In the latter case, the following are the requisites to the power of distress:—

- (1.) There must be an actual demise, and not a mere agreement for a lease;
- (2.) The rent must be certain;
- (3.) The rent must be in arrear, but in the case of rents payable in ad-

DISTRESS—continued.

vance, these are held to be in arrear instantly upon the commencement of the period for which they are payable (*Buckley v. Taylor*, 2 T. R. 600); and

- (4.) The distrainer must have the reversion in him, either an actual reversion or (at the least) a reversion by estoppel. *Morton v. Woods*, L. R. 3 Q. B. 658.

With reference to the things that are liable to be distrained, generally speaking, all moveable chattels (whether the property of the tenant or of a stranger) which are upon the demised premises at the time when the distress is made are liable. 2 W. & M., sess. 1, c. 5, s. 3.

With reference to the things that are not liable to be distrained, the following classes of things are not liable:

- (1.) Fixtures, *sed quare*;
- (2.) Title deeds;
- (3.) Things delivered to a person exercising a public trade to be managed in the way of his trade;
- (4.) Animals *feræ naturæ*;
- (5.) Things in actual use;
- (6.) Perishable goods;
- (7.) Goods in custody of the law;
- (8.) Crops or produce sold by sheriff, subject to an agreement to consume same on land;
- (9.) Frames, looms, &c., entrusted to workmen;
- (10.) Goods of an ambassador; and
- (11.) Effects of a company being wound up.

And the following classes of things are conditionally privileged from being taken in distress:—

- (1.) Implements of trade not in actual use; and
- (2.) Cattle and sheep.

The distress must be made, as a general rule, on the premises demised, subject, however, to the following exceptions:—

- (1.) Cattle or stock of the tenant feeding or being on a common appurtenant or appurtenant or otherwise belonging to the demised premises;
- (2.) Cattle seen driven off demised premises on purpose to defeat distress; and
- (3.) Goods fraudulently removed from the demised premises.

DISTRESS INFINITE. In the case of a distress for fealty or suit of Court, no distress can be unreasonable, immoderate, or too large; for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and let it be of what value it may, there is no harm done, espe-

DISTRESS INFINITE—*continued.*

cially as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and which may be repeated from time to time, until the stubbornness of the party is conquered, is called a *distress infinite*. For some other purposes, as in summoning jurors and the like, a distress infinite used also to be allowed.

DISTRINGAS. A writ of distringas may be put upon stock or moneys in the Bank of England, and its effect is exactly that of a stop-order on a fund in Chancery (*see* title STOP-ORDER). Formerly, a writ bearing this name used to be directed to the sheriff, commanding him to distrain upon the goods and chattels of a defendant, in order to compel his appearance to a writ of summons. This distringas, however, was only granted when the person requiring the same had shewn by affidavit to the satisfaction of the Court out of which the writ of summons issued, that the defendant had not been personally served with the writ of summons, and had not, according to the exigency thereof, appeared to the action, and could not be compelled so to do without some more efficacious process (1 Arch. Prac. 202). The writ in this second use of it was abolished by the C. L. P. Act, 1852.

DISTRINGAS JURATORES. A writ directed to the sheriff peremptorily commanding him to compel the appearance of jurors in Court on a certain day therein appointed. This writ also has been abolished by the C. L. P. Act, 1852. 1 Arch. Prac. 365.

DISTURBANCE. A species of injury to real property, commonly consisting of a wrong done to some incorporeal hereditament by hindering or disquieting the owners in their regular and lawful enjoyment of it. There were five principal varieties of this injury, viz.: (1.) Disturbance of franchise; (2.) Disturbance of common; (3.) Disturbance of ways; (4.) Disturbance of tenure; and (5.) Disturbance of patronage. Finch, 187.

DIVORCE (*divortium*). The separation of husband and wife by the operation of the law. There were two kinds of divorce, the one total, the other partial; the one a *vinculo matrimonii*, the other merely *à mensâ et thoro*. The total divorce, *à vinculo matrimonii*, used to be only for some canonical cause of impediment existing before the marriage, e.g., consanguinity, and not for any impediment that was supervenient, or arising afterwards, as may be the case in affinity or corporeal imbecility. In these

DIVORCE—*continued.*

cases of a total divorce, the marriage used to be declared null, as having been absolutely unlawful *ab initio*; and the parties were therefore separated *pro salute animarum*; for which reason no such divorce could be obtained but during the life of the parties. In these divorces the wife, it was said, should receive all again that she brought with her, because the nullity of the marriage arose through some impediment, and the goods of the wife were given for her advancement in marriage which was now found never to have existed. (Dyer, 62). But at the present day a divorce *à vinculo matrimonii* may be obtained for a cause that is supervenient; thus, a husband may obtain it on account of his wife's adultery, and a wife may obtain it on account of her husband's adultery, coupled with cruelty or desertion on his part; and such divorces are not unfrequently granted under the provisions of the Act 21 & 22 Vict. c. 77, without the necessity (which for some time existed) of obtaining a special statute for the purpose. This divorce enables the parties to marry again, and to do all other acts as if they had never been married. Divorce *à mensâ et thoro* used to be granted when the marriage was just and lawful *ab initio*, and therefore the law was tender of dissolving it: but for some supervenient cause it might become improper or impossible for the parties to live together, e.g., in case of intolerable ill-temper, or adultery in either of the parties. But at the present day there is no divorce *à mensâ et thoro*, but either a total divorce *à vinculo matrimonii* for the causes mentioned above, or else a judicial separation for causes that are insufficient to justify a total divorce, e.g., cruelty or incompatibility of temper, being extreme. Parties separated in this manner cannot afterwards marry again, until, at any rate, the one party is dead, when the other may lawfully marry again.

See also title ALIMONY.

DOCKET, STRIKING A. A phrase that was formerly used in the practice of bankruptcy. It referred to the entry of certain papers at the bankrupt office, preliminary to the prosecution of the fiat against a trader who had become bankrupt. These papers consisted of the affidavit, the bond, and the petition of the petitioning creditor; and their object was to obtain from the Lord Chancellor his fiat, authorizing the petitioner to prosecute his complaint against the bankrupt, either in Her Majesty's Court of Bankruptcy in London, or in one of the district Courts of Bankruptcy in the country. The affidavit had to be left at the office of the Secretary of Bankruptcy, who used to make an entry in the

DOCKET, STRIKING A—*continued.*

"docket book," and this seems to have been what was technically termed striking a docket. The bond formerly entered into by the petitioner was by the statute 5 & 6 Vict. c. 122, no longer required; but upon the affidavit being left at the office, the clerk prepared the petition, annexed the affidavit to it, and thereupon obtained the Lord Chancellor's fiat. The modern equivalent seems to be putting the petition in bankruptcy upon the files of the Court, no fiat of the Lord Chancellor being now required in order to prosecute the bankruptcy. See Bankruptcy Act, 1869.

DOGS. The stat. 30 & 31 Vict. c. 5, has imposed a tax on dogs. It seems that the owner of a dog is liable for damage done by it to cattle or sheep, without proof of his *scienter* of the nature of the dog, but that he is not liable without such proof for damage done to human beings. The stat. 34 & 35 Vict. c. 56, provides for the detention of stray dogs, and for the slaughter of such as are dangerous.

DOLE. This word is derived from the Saxon *delan*, to divide, and denotes a part or portion of a meadow which is divided; and the word still retains the meaning of divide, *e.g.*, to *dole* out alms is to divide or distribute alms.

DOME, or DOOM. This is literally a judgment, and obtained at first a neutral meaning; *e.g.*, in the Black Book of Hereford, fo. 46, this phrase occurs,—"So help me God at his holy *dome*,"—meaning at the day of last judgment. But the word has more recently acquired the meaning of *condemnation*.

DOME-BOOK. A book of judgments (*dooms, domes*). The book thus called was compiled during the time of Alfred the Great, and is said to have been extant so late as the reign of Edward IV., after which it was lost. It is generally assumed to have contained the principal rules of the Common Law (so far as these rules were then developed), together with the then penalties for misdemeanors, and the then forms of judicial proceedings.

DOMESDAY-BOOK. The book thus called was compiled in the reign and by the direction of William I., commonly called the Conqueror, and is one of the many works of permanent utility of that sovereign. It was in two volumes, and contained the details of a great survey of the kingdom, throughout all its counties, five men in each county (called justices) having been assigned in 1081 for the purpose of collecting the necessary statistics, and having completed their statement

DOMESDAY-BOOK—*continued.*

thereof in 1086, when the whole returns were thrown together and formed the two volumes of Domesday Book.

This work is an authority upon certain points of real property law; *e.g.*, upon the question whether lands of copyhold tenure are or are not of that peculiar species of copyhold which is called *Ancient Demeane*: see that title.

DOMICILE. Is the place at which a person has his principal residence, and that is generally construed to be the place at which he usually keeps his wife and family (or household gods, *ubi lar et penates*). In the case of infants and married women, their domicile is that of their parents or husband. A domicile may be either original or acquired. The original domicile (*domicilium originis*), is that at which the parents of the person are domiciled at the time of his birth, and usually agrees (under English law) with his nationality. To acquire another domicile, the rule of law is that both the *animus* (or intention to acquire it) and the *factum* (or actual acquisition of it) must combine. Now the acquisition of a new domicile is only complete when the former domicile is definitively abandoned, and an actual removal is made to the place of the acquired domicile. But for the re-acquisition of the original domicile, the definitive abandonment of the acquired domicile when followed up, or rather when evidenced, by one step towards a return to the original domicile, is sufficient.

The law of a man's domicile for the time being (whether original or acquired) determines all his personal capacities and incapacities; and to that extent it often controls the operation of the *Lex loci situs* (see that title), although not also the operation of the *Lex loci rei sitæ* (see that title). Further, the *Lex Domicilii* also regulates the distribution of his personal estate in case of his death intestate. See Story on Conflict of Laws; Westlake's Private International Law.

DOMINANT TENEMENT. In the law of easements, the tenement whose owner as such enjoys an easement over an adjoining tenement is called by this name.

See title EASEMENTS.

DONATION. In French law, every donation in order to be complete must be assented to by the donee, and if a married woman, with the consent of her husband. Immediately upon such assent being given, the gift is complete (just as in Roman Law) without any *traditio*; for a necessity is laid on the donor or his heirs to make *traditio*. In this respect, the

DONATION—*continued.*

English law differs from both, holding that not only is assent on the part of the donee necessary, but also delivery of the thing given. In French law such gifts are irrevocable, excepting for one of three causes,—(1.) The non-performance of conditions when there are any such; (2.) The ingratitude of the donee; or (3.) The subsequent birth of offspring.

DONATIO MORTIS CAUSÆ. Is a gift made in contemplation of death, and taking absolute effect upon the death. The great essential to it is a delivery actual or constructive of the thing given; and provided that requisite is observed, there is nothing which may not be the subject of such a gift, excepting a cheque (inasmuch as the authority to pay that is revoked upon the death), and excepting perhaps real property (inasmuch as the law prescribes particular formalities for the conveyance of such). There may, however, be a *donatio mortis causæ* of a mortgage debt charged on real property; and such gift is made by a delivery of the mortgage deeds.

DORMANT PARTNER. A sleeping partner.

See title **PARTNERSHIP**.

NOTE ASSIGNANDA. The writ thus described lay for a widow whose husband held of the king in chief, and was issued to the escheators upon the widow's making oath in Chancery not to marry without the king's leave. Such widows were called the king's widows.

NOTE UNDE NIHIL HABET. The writ thus described lay for a widow against a purchaser of the lands from her husband.

DOUBLE COSTS. Under the statute, 5 & 6 Vict. c. 97, all previous Acts of Parliament (whether public or private) which awarded double or treble costs are repealed, and party and party costs only, or reasonable costs upon taxation only, are to be given, when given at all.

DOUBLE PLEA. The plea thus described is faulty on the ground of duplicity. Duplicity in pleading is a fault which may arise either in the declaration or in any subsequent pleading, and signifies the allegation of several distinct matters in support of, or in answer to, a single demand, any one of which matters would be sufficient of itself to support the demand, or to answer it. Leave to plead several pleas may, however, be obtained under the C. L. P. Act, 1852, s. 81. The fault of duplicity used formerly to be taken advantage of by special demurrer; but since the C. L. P. Act, 1852, it is now to be

DOUBLE PLEA—*continued.*

met by application in a summary way under s. 52 of that Act, to amend or strike out the faulty pleading.

DOWAGER. A widow who is endowed, or who has a jointure in lieu of dower, is thus described; but in common practice the word is confined to the widows of princes, dukes, and other like persons only.

DOWER. Is the right of a widow during the residue of her life to one-third part of the lands late of her deceased husband.

(1.) In the case of widows who were married before the 1st of January, 1834, the right to dower attached to all lands of which the husband was solely seised for an estate of inheritance, and, having once attached, the right was not capable of being barred or defeated excepting by a *fine* in which the wife joined. In the absence of a *fine*, it attached upon the lands even when in the hands of a purchaser. It was not necessary that she should have any issue actually born. To exclude her dower from attaching at all was therefore the great object of every purchaser of land; and two methods were in common use, called respectively the old method and the modern method of barring dower. Under the old method, the lands were conveyed to the grantee and his heirs, to the use of the grantee and a trustee and the heirs of the grantee, with a declaration that the estate of the trustee was in trust only for the grantee and his heirs. Under the modern method, a general power of appointment was in the first place given to the grantee, and subject thereto to the grantee for his life, with remainder to a trustee and his heirs during the purchaser's life, with an ultimate remainder to the heirs and assigns of the purchaser for ever.

(2.) In the case of widows who have been married since the 1st of January, 1834, the right of dower attaches to all lands of which the husband is solely seised, or even equitably possessed, for an estate of inheritance; but although it may have once attached, the right is of the most fragile sort, being defeated by any declaration in the will of the husband, or by his devise of the lands, or by his alienation of them during his life, and even, *pro tanto*, by his debts. And it is not infrequent to exclude it from attaching even from the first, by inserting a declaration to that effect in the deed of grant, which is also now effectual to defeat the widow's right.

DOWRY. This is the proper name for the property which the wife brings to her

DOWRY—continued.

husband upon her marriage with him, and, like the *dos* of Roman Law is distinguished from the dower (or jointure in lieu thereof), which corresponds to the *donatio propter nuptias* of Roman law. The wife's dowry is often called her *maritagium* in the old statutes.

DROIT. This word signifies *right*. *Droit-droit* signifies, therefore, a right upon a right, or a double right, and was used to denote the title of one in whom the right of possession and the right of property were combined. The phrase *droitural* was used of actions which were brought upon a writ of right, as distinguished from that other group of actions called *possessory*, which were brought upon the fact of, or right to, the possession merely.

DROITS CIVILS. In French Law, denote private rights, and the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them in France, and (unless possessed of sufficient real property in France) are obliged to give security. This provision meets such a case, *semble*, as that of *Leroux v. Brown*, 12 C. B. 801.

DRUNKENNESS. Where total, is a qualified incapacity for contracting; and where the drunkenness, being partial, is caused by the other contracting party to the fraud of the intoxicated person, then it is also a ground for avoiding the contract. And with reference to crime, habitual drunkards are placed under police supervision; and persons committing any crime while in a state of temporary drunkenness are not excused thereby, but the circumstance at the very most goes only in extenuation of the offence. 1 Hawk. c. 1, s. 6; Arch. Crim. Pl. 18.

DUCES TECUM. When a person, who is not a party to an action or suit, has in his possession any written instrument which is capable of being used as evidence at the trial or hearing, he is brought before the Court upon a *subpoena duces tecum*, which is a writ commanding him to appear at the trial and *bring* the instrument *with him*. And, notwithstanding he may have some good reason for not producing it, still he must obey the writ in the first instance, not himself judging, but leaving the Court to judge of the sufficiency of his reason for the non-production.

DUCHY COURT OF LANCASTER: See title CHANCELLOR.

DUM FUIT INFRA ETATEM. This was a writ which lay for the recovery of lands which a man had alienated while under age. The writ lay also for the heir of the infant alienor.

DUM FUIT IN PRISONÂ. This was a writ which lay for the recovery of lands which a man had alienated while in prison or under duress.

DUM FUIT NON COMPOS MENTIS. This was a writ which lay for the recovery of lands which a man had alienated while insane.

DUPLICATE. Any copy or transcript of a deed or writing is called a duplicate.

DURESS. Is of two kinds, being either (1.) To the *person*; or (2.), To the *goods*. The object of placing either the person or the goods under duress being to extort money in excess of what (if anything) is rightfully owing, the law holds that the excess so obtained may be recovered back as money had and received; also, that duress (like fraud) vitiates all contracts made under its influence.

DYING DECLARATIONS. In criminal law the dying declarations of the injured person, being an adult, are admissible, but being an infant of very tender years are not admissible in evidence, the reason for the exclusion of the latter being that the child's mind is not affected by the prospect of death, as the adult's is supposed to be.

DYING WITHOUT ISSUE. Formerly, if lands were given to A., and if he died without issue, then to B. in fee simple, A. took an estate tail by implication, and B. an estate in fee simple in remainder, which, however, A. could defeat. But now, under 1 Vict. c. 26, under the same words, A. would take an estate in fee simple defeasible in case he left no issue when he died, and B. would take an estate in fee simple that was executory upon the same event, namely, A.'s leaving no issue at the time of his, A.'s, death.

E.

EALDERMAN. A title of office in Anglo-Saxon times, and holding in those times the same position of eminency that the title of Earl held during the Danish period of occupancy.

The *alderman* of the present day, meaning thereby the civic functionary so described, is clearly a derivation etymologically from the Anglo-Saxon Ealderman,

ALDERMAN—continued.

but with the changes in society which have intervened between the Anglo-Saxon and the present times, the eminency of the office has been comparatively depreciated, although the aldermanic gown is still a distinction to be aspired at.

EAR-MARK. Personal property is said to be ear-marked when it can be identified, that is, distinguished from other personal property of the same nature. As a general rule, money has no such distinguishing feature, or ear-mark.

EARNEST. In Roman Law called *arra*, is something given as evidence of the contract in Roman Law, and for the purpose (in certain cases) of binding the bargain in English Law. As the name denotes, it is given to shew that the purchaser is in earnest, and not either trifling or intending a deception. For this purpose it is not infrequently exacted by tradesmen from unknown customers giving them orders to make goods; it is originally no part of the price of the goods, and therefore is forfeited on the customer's default; but if he duly accepts and pays for the goods when made, then the earnest counts as part of the price. The giving of an earnest is one of the three alternatives prescribed by the Statute of Frauds, 29 Car. 2. c. 3, s. 17, for the validity of a contract for the sale of goods of £10 or upwards.

EASEMENTS. An easement is a privilege, without profit, which one neighbour hath of another (*Termes de la Ley*, 284); or which the owner of one tenement as such has over an adjoining tenement or the owner thereof as such, the former tenement being for this purpose called the dominant tenement, and the latter the servient tenement.

Easements are in derogation of natural rights, in whatever way such rights may have arisen, whether,

- (1.) In respect of *private* or individual ownership; or,
- (2.) In respect of *public* or common occupation,

Thus, a private owner, subject only to the maxim *sic utere tuo ut alienum non ledas*, has, in virtue purely of his ownership, an absolute power of using, or right to use, his property in whatever way he pleases, to the full extent that his interest therein extends, that is to say, to the full extent of his life-estate if he is a tenant for life, and to an unlimited extent if he is a tenant in fee simple or in fee tail absolute; and an easement in or over that estate or interest is, to the extent that the easement extends, a restriction upon that absolute right or power of user. And again, public

EASEMENTS—continued.

or common occupiers, *e.g.*, the residents in any city, town, or village, have, in virtue purely of their occupation, certain natural rights analogous to rights arising out of property, *e.g.*, a right to air or to water, to the extent that their occupation-interest extends, that is to say, to the extent of natural existence; and an easement in or over that occupation-interest is, to the extent that the easement extends, a restriction upon those natural rights.

Easements consist in *patiendo* or in *non faciendo*, and not in *faciendo*; in other words, easements extend thus far in their general effect, namely, that they oblige the private owner of the servient tenement, not in his personal capacity, but in virtue of that his connection with the servient tenement, to *permit*, or in no active sense *impede*, the owner or occupier of the dominant tenement as such in the enjoyment of his easement over the servient tenement, to the extent that such easement may extend; but they oblige no further, *e.g.*, they do not oblige the owner of the servient tenement as such in any active sense to augment the measure of the easement, or even to facilitate the enjoyment of it, as, for example, by widening or clearing out a dam or watercourse, scouring a sewer, and such like. *Pomfret v. Bicroft*, 1 Wms. Saund. 557.

Easements are of various kinds, being either,

- (1.) Easements of necessity; or,
- (2.) Easements of convenience.

An easement of necessity is one without which one's neighbour or the owner of the property adjoining could not pursue his trade or enjoy his property at all, and not merely with less readiness or comfort; and with reference to easements of that kind, the law implies or assumes a grant of them, and dispenses with the production of the grant. An easement of convenience is one by which one's neighbour, or the owner of the property adjoining, pursues his trade or enjoys his property in a readier or more comfortable way, but which he might also do without, although not so well.

An easement which is merely one of convenience under certain circumstances may, under certain other circumstances, be one of necessity, or almost of necessity. Thus, given the natural state of land, the only easement of necessity is a road or right of access to it of the simplest character over the adjoining land when it is surrounded by such latter land and there is no public highway running to it; and under such a state of circumstances all other easements, whether in the shape of ways, or in other shape or shapes, are easements of convenience merely. But given an artificial

EASEMENTS—continued.

state of land, e.g., land which has been and is applied to manufacturing processes, the easement of necessity in the shape of a right of access to it under the like circumstances as above continues to exist; but that easement, instead of being now a way of the simplest character, is enlarged into a wider way, for numerous purposes other than the mere right of personal access, and although to the extent of such enlargements of it, it would be an easement of convenience and not of necessity in the case of the natural state of land, yet in the supposed artificial state of the land, the easement is to its full extent an easement of necessity, or almost of necessity, and not of convenience merely. And similarly, rights of consuming water, rights of fouling water, rights of fouling air, may under given circumstances be easements of necessity, although in the natural state of land they would be easements of convenience merely. And such being the wavering character of the distinction between easements of necessity and easements of convenience, it is useless to make that distinction, although a true one, the cardinal division in an enumeration of the varieties of easements, which are much more usefully referred to the natural rights of user, upon which they are restrictions; and upon that principle they may be enumerated generally as follows:—

I. With reference to *Air*. Every private owner and general occupier having a natural right, recognised by the Common Law of England, to PURITY OF AIR, the easement relative to the purity of air is the following one, namely:—

(1.) A right to pollute the air (*Flight v. Thomas*, 10 A. & E. 590) to an extent justified by the customary business of the locality (*Waller v. Selfe*, 4 De G. & Sm. 315), but not further (*St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 650); and it makes no difference whether the party complaining of the pollution comes to the nuisance or not (*Bliss v. Hall*, 4 Bing. N.C. 183); at any rate, where material injury, as distinguished from mere personal discomfort, is the result of it. *St. Helen's Smelting Co. v. Tipping*, *supra*.

Again, no private owner or general occupier having a natural right recognised by the Common Law of England to the FREE PASSAGE OF AIR, the easements relative to the passage of air are the following two, namely:—

(2.) A right to the free passage of air (*Trahern's Case*, Godb. 233); but such a right seems now to be discouraged by the law. *Webb v. Bird*, 10 C. B. (N.S.) 268.

(3.) A right to send noise through the air. *Roskell v. Whitworth*, 19 W. R. 804.

EASEMENTS—continued.

II. With reference to *Light*. No private owner or general occupier having a natural right recognised by the Common Law of England to the FREE PASSAGE OF LIGHT, the easement relative to the passage of light is the following one, namely:—

(4.) A right to the free passage of light (*Aldred's Case*, 6 Rep. 54), which right, if it arise in virtue of the Prescription Act, is an absolute and indefeasible right as well for the present as for all possible future purposes (*Yates v. Jack*, L. R. 1 Ch. App. 295); but if it arise from express grant, the right is limited to the amount of light accustomed to pass at the time of the grant (*Yates v. Jack*, *supra*); and if it arise from implied grant, as where a person sells a house with windows overlooking land which he retains, the right is limited in like manner as upon an express grant. If, however, the easement is exceeded, that does not entitle the servient owner to obstruct the free passage of the accustomed light, although he is unable without doing so to obstruct the passage of the excess (*Tapling v. Jones*, 11 H. L. C. 290); and the dominant owner, in case the accustomed light is obstructed, may in Equity have either damages alone, in a few rare cases (*Heath v. Bucknall*, L. R. 8 Eq. 1), or an injunction and damages both (*Straight v. Burn*, L. R. 5 Ch. App. 166); and at Law he may always have damages, and in some cases an injunction also. See C. L. P. Act, 1854, s. 79.

III. With reference to *Water*. Every private owner or general occupier, being a riparian owner or occupier, having certain natural rights recognised by the Common Law of England in respect of natural streams, whether constant or intermittent, of a known and definite course, and not being artificial or underground, that is to say, the three following natural rights, namely:—

- (a.) A right to the NATURAL FLOW of the water;
- (b.) A right to the NATURAL PURITY of the water; and
- (c.) A right to take the water for NATURAL use, and whether for the entire or partial consumption of the water taken,—

The easements relative to those respective natural rights are the following two, namely:—

(5.) A right to divert the water (*Bealey v. Shaw*, 6 East, 209), including the right to a watercourse; and also a right to pen back the water (*Wright v. Howard*, 1 Sim. & S. 190); including the right to flood another's land in penning back the water.

(6.) A right to pollute the water. *Hall*

EASEMENTS—continued.

v. *Lund*, 1 H. & C. 676; but see *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; L. R. 1 Ch. Ap. 349.

IV. With reference to *Support*. Every private owner and general occupier having certain natural rights recognised by the Common Law of England in respect of the contiguous land, whether adjacent or sub-jacent, that is to say, the two following natural rights, namely:—

- | | |
|---------------------------|--------------------|
| (a.) A right to ADJACENT |) sufficient while |
| SUPPORT, and | |
| (b.) A right to SUBJACENT |) its natural |
| SUPPORT | |

The easements which are relative to these respective natural rights are the following three, namely:—

(7.) A right of support from underground water (*Popplewell v. Hodgkinson*, L. R. 4 Ex. 248);

(8.) A right of support for land built upon, or for buildings (*Humphries v. Brogden*, 12 Q. B. 749), or otherwise rendered more liable to subside (*Harris v. Ryding*, 5 M. & W. 71); and conversely

(9.) A right to cause a subsidence of land. *Chadwick v. Trower*, 6 Bing. N. C. 1.

V. With reference to *Ways*. Every private owner or general occupier having an exclusive natural right of way recognised by the Common Law of England over and throughout his private property, or occupation ground, the easements relative to that natural right are the following two, namely:—

(10.) A private right of way, being a right of way in an adjoining private owner or in an adjoining general occupier; and

(11.) A public right of way, being a right of way in the king's subjects generally in respect of their general occupation of the country.

These two easements differing in this respect, that while a public right of way, wherever it exists, is unlimited in extent, a private right of way, on the contrary, may be either limited or unlimited in extent, as being either a footpath, a bridle-path, a carriage way, a drift way, or any other way.

Easements being considered odious in law, because they are restrictions upon the free use of property in others, no other easements than those enumerated have been established, the following attempts to create new easements having failed,—

(1.) A right of prospect (*Aldred's Case*, 9 Rep. 58; *Att.-Gen. v. Doughty*, 2 Ves. 453);

(2.) A right of view to a shop-window (*Smith v. Owen*, 35 L. J. (Ch.) 317);

(3.) A right of undisturbed privacy, (*Turner v. Spooner*, 30 L. J. (Ch.) 803; *Re*

EASEMENTS—continued.

Penny and the South Eastern Ry. Co., 7 E. & B. 660); and

(4.) A right to the free passage of wind to a windmill. *Webb v. Bird*, 10 C. B. (N.S.) 268.

The apparent easement in these four cases, and in all such like cases, where any such exists, is in the nature of a licence only, particular or general, which is personal to the licensor and not binding on his successors in the *quasi servient tenement*. See title *LICENCE*.

Easements must be proved either by the production of the instrument which creates them, or (in the case of its loss), by prescription, whether at the Common Law, or (but in certain cases only) under statute. And those two modes of proof are also the modes of the acquisition of easements. The most usual instrument whereby an easement is created is a deed of *grant*, which again may either in so many words expressly create the easement (in which case the easement exists by reason of the express grant, and the production of such grant is the proof of its existence), or only impliedly create the easement (in which case the easement exists by reason of the implied grant, and the proof of the existence of such grant lies either in the production of an express grant involving as a necessary incident to it the implied grant of the particular easement, and the withholding of which easement would therefore be in derogation of the express grant, or else in the proof of circumstances rendering the particular easement indispensable or necessary to the beneficial enjoyment of the land expressly granted.) Also, the instrument of the creation of the easement may be a will, an Act of Parliament, or a custom even; but such modes are not usefully distinguished from a grant by deed.

Again, the easement may arise by prescription, and that, either

(1.) At the Common Law, that is to say, upon proof of uninterrupted user, for twenty years (*Mounsey v. Iremay*, 3 H. & C. 486), which is considered as implying a grant, in the absence of contrary evidence; or

(2.) Under the Prescription Act (2 & 3 Will. 4, c. 71), which, however, relates to only a limited number of easements, that is to say, the following:—

(a.) Any way or other easement *ejusdem generis* (*Webb v. Bird*, 12 C. B. (N.S.) 268; 13 C. B. (N.S.) 841);

(b.) Any watercourse;

(c.) The use of any water;

(d.) Access of light; and

(e.) Use of light.

The statute has provided that for the

EASEMENTS—continued.

acquisition of any sort of way, or of any watercourse, or of the use of any water, there shall be actual enjoyment thereof without interruption for the full period of twenty years, and if proof of such enjoyment is produced, any adverse proof purporting to shew merely that the easement had its origin in respect of time on this side of the reign of Richard I., although beyond the period of twenty years, shall be excluded, but any adverse proof of a different effect is admissible, unless in cases where proof of the actual enjoyment of the easement without interruption for the full period of forty years is produced, in which latter class of cases the only adverse proof admissible is that of some consent or agreement in writing (under hand and seal, or under hand only), expressly granting the right of enjoyment (s. 2); and for the acquisition of any access of light, or of any use of light, there shall be actual enjoyment thereof without interruption for the full period of twenty years, and if proof of such enjoyment is produced, the only adverse proof admissible is that of some consent or agreement in writing (under hand and seal, or under hand only), expressly granting the right of enjoyment (s. 3.)

By the decision in *Flight v. Thomas* (11 A. & E. 688; 8 Cl. & F. 231), taken in connection with the 4th section of the Prescription Act, the actual enjoyment for twenty years in the case of light is practically reduced to nineteen years; and the actual enjoyment for twenty years, or for forty years, in the case of any sort of way, or watercourse, or water, is also practically reduced to nineteen years or thirty-nine years, as the case may be. In all cases where the Prescription Act applies, the acquisition under that Act should be the ground of claim (*Tapling v. Jones*, 11 H. L. C. 290), although it does not follow that the acquisition by prescription at the Common Law is therefore excluded, excepting perhaps in the case of light, which depends perhaps wholly on the statute (*Truscott v. Merchant Taylors Co.*, 11 Ex. 855; but see *Lanfranchi v. Mackenzie*, L. R. 4 Eq. 421). Moreover, under the Prescription Act, the periods of twenty years and forty years respectively are to be reckoned backwards from suit or action bringing the easements into dispute (s. 4); and it has been determined that the actual enjoyment must therefore have continued to within one year at the very longest from the commencement of the suit or action (*Parker v. Mitchell*, 6 Ex. 825). Where actual user before and after a period of intermission is proved, the user is taken to have been uninterrupted or continuous (*Carr v. Foster*, 3 Q. B.

EASEMENTS—continued.

581). The 7th and 8th sections of the Act provide for the case of persons under the disabilities therein specified of disputing the easement during the period of its adverse acquisition. In all other respects the acquisition of an easement under the Prescription Act is regulated by the same principles as the acquisition of an easement by prescription at Common Law.

The varieties of adverse proof (when admissible) to the claim of an easement by prescription are the following:—

- (1.) Proof of the legal impossibility of the grant which is implied;
- (2.) Proof of the extinguishment of the easement by unity of seisin or otherwise;
- (3.) Proof of the improbability of the grant; and
- (4.) Proof of the inability of the servient owner to resist the user.

Thus, where the grant would have been void by reason of some Act of Parliament (*Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287), or where the servient owner was legally incapable to make the grant (*Wiship v. Hudspeth*, 10 Exch. 5), or was ignorant of the user (*Daniel v. North*, 11 East, 370). e.g., in the case of an alleged right to support from buildings (*Solomon v. Vintners' Co.*, 12 Q. B. 739), there is no easement.

In case the owner of the dominant tenement is hindered in his enjoyment of the easement, in other words, in the case of a disturbance of his easement, he has the following remedies:—

(1.) An action on the case at Law for the disturbance, bringing damages for the disturbances that are past, but not for such as have been committed since the commencement of the action, or are yet to come, it being a rule of the Common Law that the damages must not be for cause of action subsequent to the action in which they are recovered (2 Saund. 174, a, b). But now, under the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 79, an injunction against future disturbance may be obtained in the action.

(2.) A suit in Equity upon bill filed stating the case and the damage sustained, and praying damages and an injunction. *Wood v. Sutcliffe*, 21 L. J. (Ch.) 255; *Soames v. Edge*, Johns. 669; and Chancery Amendment Act (21 & 22 Vict. c. 27), s. 2. And such remedies lie as well for the continuance of a disturbance as for the original creation of one, upon the analogy of the principle that every continuing trespass is a fresh trespass.

(3.) The remedy by abatement of the disturbance as a nuisance is also available to the person entitled to the easement

EASEMENTS—continued.

(*Rea v. Rowell*, 2 Salk. 459); but the abatement generally involves a trespass *quare clausum fregit* (*Arnold v. Jefferson*, Holt, 498); and is for other reasons also to be discouraged. *Hyne v. Graham*, 1 H. & C. 598.

For the maintenance of an action for the disturbance of an easement, as also of a natural right, it is essential that actual damage should have been sustained (*Bonomi v. Buckhouse*, 9 H. L. C. 503), unless where the disturbance amounts to or involves a trespass, in which latter case the law presumes the damage (*Smith v. Thackeray*, L. R. 1 C. P. 564). And where the disturbance may be regarded as an injury to the right of easement itself, and the repetition of which injury would tend to destroy or prejudice the right itself, that tendency is a sufficient damage (*Harrop v. Hirst*, L. R. 4 Ex. 43). But a mere possibility of damage at some future period, unaccompanied with any present damage, is insufficient to sustain the action. *Jackson v. Newcastle (Duke)*, 33 L. J. (Ch.) 698.

The right of action sometimes varies according as the disturbance affects the dominant occupier only, or the dominant reversioner as well, it being sufficient in the case of the latter, that there should be a reasonable probability of damage to his reversion arising from the fact of the denial of the right of easement generally (*Metropolitan Industrial Dwellings Association v. Petch*, 5 C. B. (N.S.) 504). For example, an action for the pollution of air can in general only be maintained by the person in present occupation, and not by the reversioner (*Simpson v. Savage*, 1 C. B. (N.S.) 347), that injury being necessarily of a temporary nature. At the same time, if the injury is likely in any case to be of a permanent character, the reversioner may take proceedings for its suppression (*Wilson v. Townsend*, 1 Dr. & Sm. 324). *e.g.*, for the locking of a gate. *Kidgill v. Moor*, 9 C. B. 364.

A defendant to an action for disturbance may plead in justification that the plaintiff was exceeding the rightful enjoyment of his easement, and that he, the defendant, merely obstructed the plaintiff's encroachment; and this plea is good, even although the defendant's obstruction of plaintiff's encroachment has obstructed also the plaintiff's lawful enjoyment (*Cavekwell v. Russell*, 26 L. J. (Ex.) 34), with the single exception of light, as to which the plea would be bad (*Tapling v. Jones*, 11 H. L. C. 290). And it seems that when an easement of light has been acquired under the Prescription Act, there can be no encroachment, inasmuch as the user is for all purposes, future as well as present (*Yates*

EASEMENTS—continued.

v. Jack, L. R. 1 Ch. Ap. 295), although where the easement exists under an express grant the user is measured by the words of the grant.

Lastly, easements although once validly existing may have become extinguished or suspended. Thus, in the event of the dominant and servient tenement becoming united in one owner who is legally *seised* thereof, the easement as such is necessarily either extinguished or suspended, upon the maxim *nulli res sua servit* (*Sury v. Pigott*, Pop. 166). But in such event, if the easement is of the quality styled apparent and continuous, that is to say, if the existence of the easement is apparent to the eye, and those appearances continue after the unity of ownership, then it may be concluded from the cases of *Suffield v. Broten* (33 L. J. (Ch.) 349) and *Crossley v. Lightowler* (L. R. 2 Ch. Ap. 486), that if the once-dominant tenement is sold, the easement revives without any fresh creation by grant or otherwise, and is taken to have been suspended merely, but that if the once servient tenement is sold, the easement does not revive without some fresh creation by reservation or otherwise, and is taken to have been extinguished; and the like rule applies in the case of those rights or *quasi-easements*, being apparent and continuous, which the common owner has exercised over the one portion of his land for the benefit of the other portion of it, where the two portions, being respectively the *quasi-servient* and *quasi-dominant* lands, have never been the properties of several owners.

Where an easement (like a natural right) is suspended merely, it revives (like a natural right) upon the removal of the cause of the suspension (*Bower v. Hill*, 2 Bing. (N.C.) 339); on the other hand, where an easement (unlike a natural right) is extinguished altogether, it does not revive merely upon the removal of the cause of the extinguishment, but requires in addition for its revival, or rather re-establishment, a re-grant thereof. *Bower v. Hill*, *supra*.

EAT INDE SINE DIE. When judgment is given for the defendant, and the cause is at an end, *he may go thence without a day*, *i.e.*, without any further adjournment and continuance of the cause; in effect, therefore, these words are a judgment that the king's writ commanding the defendant's attendance has now been fully satisfied, and that his innocence has been publicly established.

See also title **SINE DIE**.

ECCLESIASTICAL COMMISSIONERS. These are a body of men constituted under

ECCLESIASTICAL COMMISSIONERS—*continued.*

the stats. 3 & 4 Vict. c. 86, and 29 & 30 Vict. c. 18, for the general management and supervision of the estates of the Church, being either episcopal or capitular, and for the proper application of the revenues or produce thereof in support and extension of the Church.

ECCLESIASTICAL COURTS: See COURTS ECCLESIASTICAL.

EDUCATION: See titles ELEMENTARY SCHOOLS; PUBLIC SCHOOLS.

EFFLUXION OF TIME. When this phrase is used in leases, conveyances, and other like deeds, or in agreements expressed in simple writing, it indicates the conclusion or *expiration* of an agreed term of years specified in the deed or writing, such conclusion or expiration arising in the natural course of events, in contradistinction to the *determination* of the term by the act of the parties or by some unexpected or unusual incident or other sudden event.

EIGNE. This word is a corruption of the French word *ainé* or *ainé*, meaning eldest. The phrase is usually found in connection with bastard, and a *bastard eigne* is commonly used to describe a son born before the intermarriage of his parents, in contradistinction to a *mulier puise*, who is the second or other son born of the same parents subsequently to their intermarriage. By the laws of England, and in particular by a clause in the Statute of Merton (20 Hen. 3, c. 9), a *bastard eigne* remains a bastard even after the intermarriage of his parents, and as such is incapable of inheriting from or through either of his parents; and neither is he their, or either of their, next of kin. By the laws of some other countries (e.g., of Scotland), he becomes legitimate upon the intermarriage of his parents; and even by the laws of England, he has a modified right of inheriting to his parents or either of them, in this way, namely, that if he enters upon the lands of his parent upon the parent's death, and afterwards dies seised thereof, his issue succeeding him in the possession of the lands may hold and enjoy the same as against the *mulier puise* and his heirs.

EIRE, or EYRE. This word is a French corruption of the Latin word *iter*, and means a *way*. The word usually occurs only in the phrase *justices in eyre*, called also *justices itinérant*, a body of judges who were instituted for the first time in 1176 by an Act of the Parliament held at Northampton in that year. Under that Act the kingdom was divided into six circuits, and

EIRE, or EYRE—continued.

these newly created judges were commissioned to travel through the various counties comprised in the several circuits, and therein to administer justice upon writs so-called of *assize* (see title ASSIZE). It is from this early institution that the present justices of *assize* and *nisi prius* are historically derived.

See title COURTS OF JUSTICE.

EJECTIONE CUSTODIE. This phrase, which is the Latin equivalent for the French *ejectment de garde*, was the title of a writ which lay for a guardian when turned out of any land of his ward during the minority of the latter.

EJECTMENT. This is an action for the recovery of land. The action originated as far back as the reign of Edward III., and was then a species of personal action brought to recover damages only for the ouster. But towards the end of the 15th century the possession, it was decided, might be recovered by it. From that time until the C. L. P. Act, 1852, the action was encumbered to a very large extent with fictions, being in the form of *Doe d. Thomas v. Richard d. Roe*, the first-mentioned person, viz., Doe, being the nominal plaintiff only; the second-mentioned person, viz., Thomas, the real plaintiff, and who was commonly called the lessor of the plaintiff; the third-mentioned person, viz., Richard, being the tenant in possession; and the fourth-mentioned person, viz., Roe, being the imaginary ejector, and who was commonly called the casual ejector. The declaration was the first step in the action, and was framed in trespass and ejectment between *Doe v. Roe*; it was served upon the tenant in possession, who or his landlord thereupon obtained a "consent rule" of the Court to appear and defend the action, admitting the fictitious lease, entry, and ouster, and consenting to defend the action upon the strength of his *title* and nothing else. Thereafter the question came on to be tried upon its merits, and was in substance the following:—Whether the lessor of the plaintiff, on the day when he was alleged to have made the lease to John Doe, and from thence until the service of the declaration, was entitled to the property in question; if the verdict was in the affirmative, the plaintiff recovered; and if in the negative, then the defendant remained in possession, and also recovered his costs of the action from the lessor of the plaintiff.

But at the present day, under the C. L. P. Act, 1852, ss. 168, 221, the mode of proceeding in ejectment is as follows:—

(1.) In cases other than between landlord and tenant,—A writ of summons is

EJECTMENT—*continued.*

issued precisely as in a personal action, and is directed to the persons in possession, and to all persons entitled to defend the possession; and it describes with a reasonable certainty the property claimed. The writ also states the names of all persons in whom the title is alleged to be, and commands the persons to whom it is directed to appear within sixteen days after service thereof to defend the possession, and gives notice that in default of appearance they will be turned out of possession. The writ remains in force for three months, and is to be served personally if possible. Immediately upon service, the tenant in possession is forthwith to give notice thereof to his landlord, who may by leave of the Court or a judge appear and defend.

An appearance having been thus entered, an issue may be made up without any pleadings, by the plaintiff merely setting forth the writ, and stating the fact and date of appearance; and the sheriff is directed to summon a jury. The issue is then delivered by the plaintiff to the opposite party, and the action comes on for trial in the usual way. The question for trial is, in substance, whether the statement in the writ of the plaintiff's title is true or false, and if true, then which of the plaintiffs, if more than one, is entitled, and whether to the whole or to what part; and then, according to the verdict, the plaintiff recovers or not. But in a proper case a special verdict may be found, and either party may tender a bill of exceptions. The damages for the interim detention of the property are in general recovered in an action of trespass for mesne profits.

The plaintiff if successful then obtains a writ of execution, called a writ of *habere facias possessionem*, the writ being directed to the sheriff as in the usual case.

In case the judgment is afterwards reversed in error or on appeal, a writ of *restitution* may be awarded.

(2.) In cases between landlord and tenant,—Putting aside the provisions made by statute for the recovery of small tenements for causes sufficient to support an ejectment, the mode of ejectment between landlord and tenant is as follows:—

(a.) If there be a sufficient distress on the premises to answer the amount of rent due.—The proceeding in this case must be by the Common Law, and not under the C. L. P. Act, 1852, and is as follows:—Before commencing the action, a demand must be made for the rent, and usually by the landlord in person, upon the land, on the last

EJECTMENT—*continued.*

day limited for payment to save a forfeiture, and at sunset of that day. If the tenant fails to pay, then the proceedings in ejectment are to be taken as in an ejectment between strangers explained above.

(b.) If there be no sufficient distress on the premises to answer the amount of rent due, and one-half year's rent is due.—The proceeding in this case is under the C. L. P. Act, 1852, s. 210, and is as follows:—The landlord or his agent must make a search over the land to prove the insufficiency of the property thereon to answer the distress, and must furnish himself with proof thereof for the satisfaction of the Court. Thereafter the writ is the same as in the ordinary case of ejectment as between persons who are strangers to each other, as explained above. See Smith's Action at Law, 398-429.

ELECTION. Is the name of a head of Equity jurisprudence, which directs as follows:—Where, by one and the same instrument, property belonging to A. is given away to B. without the consent of A., and other property of the testator's or settlor's own is at the same time given to A., without any express condition that A. is only to take the latter property if he consents to give up his own property to B., then there is an implied condition to that effect; nevertheless if A. will keep his own property, he is only bound to give up to B. an equivalent for it out of the property of the testator or settlor which is given to himself, and he may thereafter keep the difference and also his own property, *compensation* and not *forfeiture* being the rule in all cases of election.

The question of election is sometimes encumbered by part of the property given being the subject of a special power of appointment among children or other limited classes of objects; but the rule in these cases, although somewhat more encumbered in its details, is in substance the same, viz.:—

(1.) When the intended appointees of the property are also the persons entitled in default, then in every such case:—

(a.) If the testator gives them some property of his own, and gives away either the whole or part of the appointment property to other persons who are not objects of the power at all, the intended appointees are put to their

ELECTION—continued.

election (*Whistler v. Webster*, 2 Ves. Jun. 367); but

- (b.) If the testator gives them no property of his own, under the like circumstances, they are not put to their election. *Bristolove v. Warde*, 2 Ves. Jun. 336.

(2.) Where the intended appointees are not also entitled in default, but some other person or persons are entitled in default of appointment, inasmuch as in this case, clearly, the donee of the power has the intended appointees, and (although to a less extent) the person or persons entitled in default, under his entire control, to give or not to give the property to them:—

- (a.) The intended appointees cannot complain whatever the donee of the power should do, and must simply be thankful for what they get; but
- (b.) The person or persons entitled in default have a right to say that, an improper appointment being no appointment at all, they are entitled to all that part of the property which is improperly appointed; and if the appointor wants to shut them up from complaining of and defeating his improper appointment, he must give them some property of his own, "as a sop to pacify them;" for otherwise they will not be put to their election. But if he does give them some property of his own, they will be put to their election, according to the general rule.

ELECTION COMMITTEE. This was a committee of the House of Commons appointed to inquire into the validity of the election of its own members. Its mode of proceeding was regulated by the Act 4 & 5 Vict. c. 58, which prescribed a remedy by petition in favour of the party aggrieved, whether he were a candidate for election or an elector, and to which petition the member actually returned was made respondent. The petition was, in the first instance, delivered by either party to the general elections committee appointed by the House at the commencement of the session, and was then referred by that committee to the Select Committee, which consisted of a chairman and six other members. This select committee, being sworn duly to try the matter, were empowered for that purpose to examine witnesses on oath; and by the majority of their voices they determined the validity or invalidity of the past return, together with consequential findings. These election committees have been superseded by

ELECTION COMMITTEE—continued.

the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which has provided in effect as follows:—

A petition complaining of an undue return is to be presented in the Court of Common Pleas by any one who either voted or had a right to vote at the election, or by the defeated candidate; and such election petition (as it is called) is to be tried before a puisne judge of the superior Courts, three such judges (to be called the election judges), being chosen for this purpose from among the judges of those Courts respectively. The trial is to take place, in the case of a borough election, in the borough, and in the case of a county election, in the county, excepting in exceptional cases; and at the conclusion of the trial the judge is to declare the validity or invalidity of the return, and who is duly elected, or whether the election is wholly void, and is to certify his determination to the Speaker of the House of Commons, and the determination so certified is final to all intents and purposes. See also next title.

ELECTIONS, COMMONS' RIGHTS IN.

At the election for Bucks, in 1604, Sir Francis Goodwin was chosen in preference to Sir John Fortescue. Now, as Goodwin was an outlaw, and the King, by proclamation of the previous year, had forbidden the return of such persons as members, the return made by the sheriff into Chancery was sent back to the sheriff, and a second election was directed to be made, upon which latter election, Sir John Fortescue was returned.

With this interference in election matters on the part of the King, the Commons were greatly annoyed, and they resolved that the election of Goodwin was lawful. The Lords thereupon requested the Commons to explain the matter; but the Commons answered that it was not consistent with the dignity or the practice of their House to account for their proceedings. The King thereupon directed a conference between the Lords and Commons upon the matter, and afterwards a second conference between the Commons and the judges; but the Commons refused to obey either direction, whereupon the King commanded the same as an absolute monarch. Upon this, the Commons yielded, and the conference between them and the judges came off and ended in both members being set aside and a writ issued for a new election, the King directing that all the proceedings in the matter should be erased from the journals.

Subsequently, in the year following (1604–5), the Commons delivered to the King a declaration of their rights, and which declaration (entitled "A Form of

ELECTIONS, COMMONS' RIGHTS IN—
continued.

Apology and Satisfaction") was to the following effect:—

"(1.) That the privileges and liberties of the Commons are their right and their inheritance no less than their very lands and goods, and that the same privileges and liberties are not given up by the customary request made by the Commons at the commencement of parliaments, that they may enjoy their privileges and liberties as in times past, for that such request is a mere act of courtesy on their part;

"(2.) That their House is a Court of Record, and that there is no Court in the kingdom which can compare with the High Court of Parliament;

"(3.) That the House of Commons is the sole proper judge of election matters; and

"(4.) That the power of the High Court of Parliament being above the Law is not founded on the Common Law, but that Court has rights and privileges peculiar to itself."

ELECTIONS, CROWN'S INFLUENCE IN. By the stat. 28 Edw. 1, st. 3, c. 8, the power to elect the sheriffs had been given to the people, but that power was transferred to the king by the stat. 9 Edw. 2, st. 2, and the election of sheriffs was rendered annual and the old sheriffs made re-eligible by the stat. 14 Edw. 3, st. 1, c. 7. Now—

(1.) The first mode in which the Crown endeavoured to influence elections was furnished by this attitude of the sheriffs to the Crown; for the sheriff being the nominee of the Crown and being anxious to retain a lucrative and influential position, it was a matter of policy on his part to return members who should support the Crown, and to omit altogether (as he was well able in those times to do), the return of members from boroughs not well disposed towards the Crown.

In later times, other modes were adopted by the Crown to influence elections, namely, the following,—

(2.) The creation of new boroughs, *e.g.*, Edward VI. created 22, Mary 14; Elizabeth over 50, and James I. about as many;

(3.) The dispatch of circular letters to the nobility and influential gentry in the provinces, *e.g.*, in the reigns notably of Edward VI. and James I.;

(4.) The securing a favourable party in the Commons, *e.g.*, by means of the *undertakers* of James I., being five in number (Neville, Yelverton, Hyde, Crew, and Digges), who undertook to keep up a favourable majority for the king;

(5.) The re-modelling or purging of corporations, *e.g.*, by James II., by means of his Regulators of Corporations; and

ELECTIONS, CROWN'S INFLUENCE IN—
continued.

(6.) The distribution of places and pensions by the sovereign and his ministers,—a mode of influence which was originated and carried to excess in the reign of George III., and which has, more or less, continued almost until the present day.

ELECTIONS, PARLIAMENTARY: See for the latest practice in these matters, Bushby's Elections Manual, by Hardcastle, 1874.

ELECTORAL FRANCHISE. This phrase denotes most commonly the qualifications of the persons entitled to elect members of parliament, whether in counties or in boroughs; although it may also apply to the qualifications (now entirely repealed) of persons entitled to become candidates for election. A brief history of the electoral franchise at different periods is as follows:—

I. In the case of Counties: It appears that originally all the freeholders of the county, whether resident or not, elected the members for the county (7 Hen. 4, c. 15); that afterwards by the stat. 1 Hen. 5, c. 1, residence was made a necessary qualification; that the number of electors occasioning turbulence, the forty shillings freehold qualification was imposed by 8 Hen. 6, c. 7; that the stat. 14 Geo. 3, c. 58, dispensed with the qualification of residence. More recently, by the Reform Act, 1832, the electors for counties were increased by the addition of copyholders and leaseholders for terms of years, and of tenants at will, paying a rent of £50 a year.

II. In the case of Boroughs: It appears that originally the right of election in these was very various, the chief varieties of qualification being the following:—

(1.) All inhabitant householders resident within the borough;

(2.) All inhabitants paying "scot and lot";

(3.) All "potwallers," *i. e.*, persons (whether householders or lodgers) furnishing their own diet;

(4.) All persons holding burgage lands; and

(5.) All persons enjoying corporate rights. And in some boroughs two or more of these qualifications might be combined.

After many fruitless endeavours, extending through the reigns of George III. and George IV., the Reform Act, 1832, regulated the representation as follows: A £10 household franchise was uniformly established in all boroughs, saving only the rights of corporate towns. Ultimately, by the Act 30 & 31 Vict. c. 102 (the Representation of the People Act, 1867), which extends as well to counties as to boroughs, the rights of election have been regulated as follows:—

ELECTORAL FRANCHISE—continued.

I. In the case of Counties: Every person duly registered as a voter, and who is of full age and capacity, and who is the owner of lands or tenements of freehold, copyhold, or any other tenure whatever, for his own life or *pur autre vie*, or for any larger estate of the clear yearly value of not less than £5, or who is entitled either as lessee or assignee to the unexpired residue of a term of years which was originally for a period of not less than sixty years, determinable or not on a life or lives, of the like clear yearly value (s. 5); or who has occupied for twelve months lands or tenements within the county of the rateable value of £10, and has been rated for the same for the relief of the poor, and has paid such rates (s. 6).

II. In the case of Boroughs,—every person duly registered as a voter, and who is of full age and capacity, and who has for twelve months preceding been an inhabitant occupier, whether as owner or tenant, of any dwelling-house within the borough, and who has been rated for the same for the relief of the poor, and has paid such rates; or who as a lodger has occupied in the borough separately and as sole tenant for twelve months preceding the same lodgings in a house of the clear yearly value of £10 at the least, and has also resided for that period in such lodgings (s. 5).

ELEGIT. This is a writ of execution, and is so called because the plaintiff has chosen this particular writ in preference to others. The writ was first given by the statute of Westminster the Second (13 Edw. 1), c. 18, and has received a more extensive operation from the statute 1 & 2 Vict. c. 110. The writ is available for the recovery of either a debt or damages due upon a judgment or upon the forfeiture of a recognizance taken in the King's Court. By the Common Law (apart from statute), a judgment creditor could come upon the goods and chattels and the presently accruing profits of the lands and hereditaments of his debtor (the writ of execution for that purpose being either a *fi. fa.* or a *levari facias*), but he could not come upon the lands or hereditaments themselves so as to have the possession of them; by the statutes before mentioned, he has been enabled, by means of the writ of *elegit*, to appraise (instead of selling) the goods and chattels of his debtor and to obtain a delivery of the same to himself at such appraisement in part satisfaction of his judgment debt; and in case his judgment is not fully satisfied thereby, then the moiety (under 13 Edw. 1, c. 18) or the entirety (under 1 & 2 Vict. c. 110) of the lands themselves may be taken possession of under the *elegit*. During such time as

ELEGIT—continued.

the judgment creditor so holds the lands under his *elegit*, he is called a *tenant by elegit*, and his estate in the lands is a *tenancy by elegit*.

See also titles EXECUTION, WRIT OF; JUDGMENT DEBTS.

ELISORS. If the sheriff who returns the jury in an action is himself an interested party in the action, upon his array being quashed, the jury is to be summoned by the coroner; and if the coroner's array is also challenged and quashed, then the jury is to be summoned by two clerks of the Court, who for that matter are called *elisors*, and to whose array no challenge is allowed. The word *elisors* is by many supposed to mean *electors*, from the French *élire*, to elect.

ELOIGN, ELOIGNMENT. When a defendant has recovered judgment in an action of replevin, he obtains a writ of execution *de retorno habendo*, for the return of the things distrained; and in case the sheriff in executing this writ finds that the goods have been conveyed to places unknown to him, so that he cannot execute the writ, he makes a return to the writ, that the goods are *eloined*, i.e., taken to a distance out of his jurisdiction or to some place unknown to him. This return of the sheriff is called a return of *eloinment* or *elongata*. The defendant is thereupon entitled to sue out a writ of *capias in withernam*, as to which, see that title. Failing satisfaction by this writ, the defendant may then sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of the *eloined* distress should not be made good out of the lands and goods of the pledges; and if no cause be shewn, then the plaintiff has execution against the lands and goods of the pledges, and in case the registrar of the county court who granted the replevin has not taken pledges, the defendant has an action on the case against him for his omission, and the damages arising therefrom.

EMANCIPATION. In French Law, a father or mother (being a widow) may by a simple declaration emancipate a child at the age of fifteen years; and the marriage of a child, at whatever age, operates an emancipation. An orphan of the age of eighteen years may be emancipated by a decision of the *conseil de famille*. The effects of emancipation are to render the child competent to act generally on his own account in all matters of a purely administrative character; but he remains subject to all former disabilities in respect of the alienation of capital, of real estate (*ses immeubles*), of loan transactions, and

EMANCIPATION—continued.

the like. If a trader, his capacity is unlimited. Code Nap. 1, 10, 3.

EMBARGO. Is the hindering or detention by any government of ships of commerce in its ports. If the embargo is laid upon ships belonging to citizens of the state imposing it, it is called a *civil* embargo, an example of which occurred in 1807 in the conduct of the United States; on the other hand if (as more commonly happens) the embargo is laid upon ships belonging to the enemy, it is called a *hostile* embargo. The effect of this latter embargo is that the vessels detained are restored to the rightful owners if no war follows, but are forfeited to the embargoing government if war does follow, the declaration of war being held to relate back to the original seizure and detention. See Wheaton, pp. 372-373.

EMBEZZLEMENT. May be roughly defined as stealing by clerks, servants, or agents. It is not larceny,—that offence involving a taking without the will of the owner, which a clerk, servant, or agent who is entrusted to take cannot be said to do. But the offender *intercepts* and misapplies money or such like things; and this constitutes the offence of embezzlement under the stat. 24 & 25 Vict. c. 96, ss. 68-72. The offence is a felony, and is punishable precisely as larceny is (see that title). In case a larceny is proved upon an indictment for embezzlement, the defendant may be convicted of the former offence, and *vice versa*. Any number of distinct embezzlements not exceeding three, committed within a period of six months, may be joined in the same indictment.

EMBLEMENTS. These are the away-going crop, in other words, the crop which is upon the ground and unreaped when the tenant goes away, his lease having determined; and the right to emblements is the right in the tenant to take away the away-going crop, and for that purpose to come upon the land, and do all other necessary things thereon. The instances in which the right to emblements exist are the following:—

- (1.) A tenant for life sowing the lands and dying before harvest, his executors will have the right;
- (2.) An under-tenant, whose tenancy is suddenly and without his own act determined before harvest, *e.g.*, by his landlord's estate determining (whether by the death or re-marriage of the latter), has the right (*Kingsbury v. Collins*, 4 Bing. 207);
- (3.) A tenant at will, who is ousted by

EMBLEMENTS—continued.

his landlord, for no cause of forfeiture (Co. Litt. 66 a); or who suddenly dies, or whose landlord suddenly dies (Co. Litt. 55 b);

- (4.) A tenant by the curtesy (2 Bl. 122) or in dower (20 Hen. 3, c. 2),—upon their deaths; and,
- (5.) A tenant *pur autre vie* (Co. Litt. 55 b) and a parson (28 Hen. 8, c. 11), upon the determination of their estates otherwise than by their own act or default.

But the following persons have no right to emblements, notwithstanding the sudden determination of their tenancy:—

- (1.) A tenant for life who determines the tenancy by his or her own act, *e.g.*, a widow who re-marries, being only entitled during her widowhood;
- (2.) A tenant at will or for years who commits a forfeiture or otherwise wilfully determines his own tenancy;
- (3.) A tenant at sufferance (7 M. & W. 235);
- (4.) Tenants at a rack rent since 1851, in virtue of the 14 & 15 Vict. c. 25, s. 1, whose tenancy, but for that act, would have suddenly determined by the death or cesser of the estate of their landlord, these tenants now holding on until the expiration of the then current year of their tenancy, and apportioning their rent between the executors of the deceased landlord and the estate of the succeeding landlord (see APPORTIONMENT OF RENT);
- (5.) Mortgagors, although to some extent they are tenants at will;
- (6.) A tenant in dower becoming unchaste;
- (7.) A parson who resigns his living. *Bulwer v. Bulwer*, 2 Barn. & Ald. 470

EMBRACERY. This offence consists in the attempt to influence a jury corruptly to one side or the other, by promises, persuasions, entreaties, entertainments, douceurs, and the like. The person guilty of it is called an *embracer*, and is punishable under 19 Hen. 7, c. 13; and see stat. 6 Geo. 4, c. 50.

EMPHYTEUSIS. Is a term of Roman Law, and which finds a near equivalent in the phrase *fee farm* of English Law, being the letting of lands or houses to a lessee for ever, subject to the payment of a perpetual rent, usually of small amount. The interest of the holder (who is called the *emphyteuticarius*) is assignable, *i.e.*, alienable; and the landlord may not eject him

EMPHYTEUSIS—*continued.*

unless for non-payment of the rent agreed. In case the entire subject-matter of the lease is destroyed, the loss falls upon the landlord; but a particular loss falls upon the tenant.

See title **FEE FARM RENT.**

ENCROACHMENT: See titles **APPROVE-MENT**; **COMMON.**

ENDOWMENT. This term is commonly applied to any provision for the officiating minister of a church, the provision usually consisting in the setting apart of a portion of lands for his maintenance. Thus, in ancient times, the lord of a manor, when he built a church on his demesne lands, usually endowed it with a piece of land, called the *glebe* (see title **ADVOW-SONS**). But at the present day, many endowments consist in money or consols simply, which private individuals have given to trustees in trust for the charity (see title **CHARITIES**). And there are also special modes of endowment adopted by the Ecclesiastical Commissioners. See that title.

ENFEOFF. This means to vest in another by means of a *feoffment* the legal estate in lands.

See title **FEOFFMENT.**

ENFRANCHISEMENT. This term is usually applied to copyhold lands, and as so applied denotes the conversion of the copyholds into freeholds. The mode of enfranchisement is regulated at the present day by the stat. 4 & 5 Vict. c. 35, and the Copyhold Acts, 1852 and 1858, under which Acts great facilities are afforded for the commutation of the lord's customary rights; moreover, enfranchisement is rendered compulsory at the wish either of the lord or of the copyhold tenant, with this difference in the two cases, namely, that if the compulsory enfranchisement is made at the wish of the tenant, the commutation of the lord's rights consists in a gross sum of money, either paid at the time of the completion of the enfranchisement, or secured by a mortgage of the lands; whereas, when the compulsory enfranchisement is made at the wish of the lord, the commutation of his rights consists in an annual rent-charge issuing out of the lands enfranchised. The effect of enfranchisement is, to discharge the lands of all customary incidents, e.g., the custom of descent to the customary heir, and to annex to them all the incidents of freehold lands.

ENGRAVINGS: See title **COPYRIGHT.**

ENLARGE. This term is commonly used in connection with *rules* calling upon

ENLARGE—*continued.*

either party to an action or suit to do a certain thing by a specified day; the judges in such a case will, on sufficient grounds being shewn for so doing, enlarge the time originally specified for doing the act, in which case the rule is said to be *enlarged*, meaning that the time specified in it has been enlarged, i.e., extended. Similarly, an arbitrator often enlarges the time for making his award; and the Court of Chancery may, and often does, enlarge the time for filing evidence in a suit, or for taking some other step in the suit, where the Court is satisfied upon affidavit that there is good reason for so doing.

ENQUIRY, WRIT OF: See **INQUIRY, WRIT OF.**

ENROLMENT: See **INROLMENT.**

ENTERING APPEARANCE: See **APPEARANCE.**

ENTERING JUDGMENTS. The formal entry of the judgment on the rolls of the Court, which used to be a necessary preliminary to suing out execution on the judgment, and which is still necessary before bringing error or an action of debt on *scire facias* on the judgment. However, by the C. L. P. Act, 1852, s. 206, and r. 70, H. T. 1853, it is not necessary, before issuing execution, to enter the proceedings on any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the judgment, and judgment may thereupon be signed, costs taxed, and execution issued; but it is provided that the proceedings may be entered on the roll as heretofore, whenever the same may become necessary for the purpose of evidence, or of bringing error, or the like. This entry of the judgment may, it seems, be made after any lapse of time. *Barrow v. Croft*, 4 B. & C. 388.

ENTIRETY. A tenancy by entirety or (in the case of husband and wife) *entireties*, is a tenancy in which the entire or sole possession is in one person, as distinguished from a joint or several possession by two or more persons; in other words, tenants by entireties are seised *per tout*, and not also *per my*, whereas joint tenants are seised *et per my et per tout*. Consequently, upon the death of either tenant by the entireties, the other takes the whole under the original grant, and not (as is the case in joint tenancy) by the new or independent title of survivorship. The effects of such a tenancy are, that neither tenant can convey the whole of his estate without the other, and neither can sever without the other; and this curious result follows from the unity of the two

ENTIRETY—*continued.*

persons of husband and wife, that a gift to them and a third person of lands or of goods in words which purport to make the three parties joint tenants, or even tenants in common, carries one moiety only to the husband and wife, and leaves the other moiety to the third person. *Atcheson v. Atcheson*, 11 Beav. 485; *In re Wyld's Estate*, 2 De G. M. & G. 724.

ENTRY. The actual taking possession of lands or tenements by entering upon the same. This is a remedy which the law affords to an injured party ousted of his lands by another person who has taken possession thereof without right. This remedy (which must in all cases be pursued peaceably) takes place in three only out of the five species of ouster, viz., abutement, intrusion, and disseisin; for as in these three cases, the original entry of the wrongdoer is unlawful, so the wrong may be remedied by the mere entry of the former possessor. But it is otherwise upon a *discontinuance*, or *deforcement*, for in these latter two cases, the former possessor cannot remedy the wrong by entry, but must do so by action, inasmuch as the original entry being in these cases lawful, and therefore conferring an apparent right of possession, the law will not suffer such apparent right to be overthrown by the mere act or entry of the claimant. And by the Act 3 & 4 Will. 4, c. 27, s. 10, no person shall be deemed to have been in possession of any land within the meaning of that Act, merely by reason of his having made an entry thereon; and by the same Act, s. 11, no continual or other claim upon or near any land shall preserve any right of making an entry.

ENTRY, WRIT OF. A writ made use of in a possessory action directed to the sheriff, requiring him to command the tenant of the land that he do render the same to the demandant, because that he the tenant had not entry into the land in question, but by or after a disseisin, intrusion, or the like, made within the time limited by law for such actions; or that in case of his refusal so to render the land, he do appear in Court to shew the reason of his refusal. It was usual to specify in the writ the *degree* or *degrees* within which the same was brought, in this manner: (1.) If the writ was brought against the party himself who did the wrong, then it only charged the tenant himself with the injury,—*non habuit ingressum nisi per intrusionem quam ipse fecit*. (2.) If the writ was brought against an alienee of the wrongdoer, or against the heir of the wrongdoer, then it was said to be in the first degree, and charged the tenant

ENTRY, WRIT OF—*continued.*

in this manner: that he the tenant had not entry but by, *i.e.*, *through, per*, the original wrongdoer who alienated the land or from whom it descended to him,—*non habuit ingressum nisi per Gulielmum, qui se in illud intravit, et illud tenenti dimisit*. (3.) If the writ was brought against a tenant holding under a second alienation or descent, then it was said to be in the second degree, and charged the tenant in this manner: that he the tenant had not entry but by, *i.e.*, *through, per*, a prior alienee, to whom, *cui*, the original wrongdoer demised the same,—*non habuit ingressum nisi per Ricardum cui Gulielmus illud dimisit, qui se in illud intravit*. (4.) If the writ was brought against a tenant holding under more than two alienations or descents, *i.e.*, after two degrees were past, it was framed upon the Statute of Marlbridge (52 Hen. 3), c. 30, which first gave the writ in this case; and as that statute provided that when the number of alienations or descents exceeded the usual degrees, *i.e.*, two degrees, the writ should not mention the degrees at all—the writ was called a writ of entry *sur disseisin* in the *post*, and charged the tenant in this manner: that he the tenant had not entry unless *after, post*, or subsequent to the ouster or injury done by the original wrongdoer,—*non habuit ingressum nisi post intrusionem quam Gulielmus in illud fecit*.

By the Act 3 & 4 Will. 4, c. 27, s. 36, and the C. L. P. Act, 1860, s. 26, all real actions have been abolished.

ENTRY AD COMMUNEM LEGEM.

This was a writ of entry which lay for a reversioner after the alienation and death of the particular tenant for life, against him who was in possession of the land.

ENTRY AD TERMINUM QUI PRÆTERIIT. This was a writ of entry which lay for a reversioner when the possession was withheld from him by the lessee or a stranger, after the determination of a lease for years.

ENTRY IN CASU PROVISO. This was a writ of entry provided by the Statute of Gloucester (6 Edw. 1), c. 7; it lay for a reversioner after the alienation by tenant in dower or tenant for life, and during the life of such tenant.

ENTRY IN CONSIMILI CASU: See title CASU CONSIMILI.

ENTRY ON THE ROLL. In former times, the parties to an action personally or by their counsel used to appear in open Court and make their mutual statements *viva voce*, instead of as at the present day delivering their mutual pleadings, until

ENTRY ON THE ROLL—*continued.*

they arrived at the issue or precise point in dispute between them. During the progress of this oral statement, a minute of the various proceedings was made on parchment by an officer of the Court appointed for that purpose; the parchment then became the record, in other words, the official history of the suit. Long after the practice of oral pleading had fallen into disuse, it continued necessary to enter the proceedings in like manner upon the parchment roll, and this was *entry on the roll*, or making up the *issue roll*, as it was otherwise called.

But by a rule of H. T. 4 Will. 4, the practice of making up the *issue roll* was abolished; and it is now only necessary to make up the issue in the form prescribed for that purpose by a rule of H. T., 1853, and to deliver the same to the Court and to the opposite party. The issue which is delivered to the Court is called the *nisi prius record*; and as that is the only thing the Court will look at, it may be regarded as the official history of the suit, in like manner as the *issue roll* formerly was.

ENURE. This word means to operate or take effect. Thus, a release in fee from a reversioner to his prior tenant *enures* by way of the enlargement of the particular tenancy into a fee simple; also, a grant by one joint tenant to another will *enure*, i.e., operate, as a release (*Chester v. Willan*, 2 Wms. Saund. 97 a), and a release as a covenant to stand seised. *Roe v. Tramarr*, Willcs, 632.

EQUITABLE ESTATE: See title Uses.

EQUITABLE MORTGAGE: See title MORTGAGE.

EQUITABLE PLEAS AND REPLICATIONS. Under the C. L. P. Act. 1854 (17 & 18 Vict. c. 126), it is permitted to plead equitable defences at Law, beginning the plea with the words, "For defence or equitable grounds." Such plea required to be such as would have entitled the defendant who pleaded it to an unconditional injunction upon bill filed in Equity; but that is not now the law, under the Judicature Act, 1873. Equitable pleas make the replications and all subsequent pleadings equitable also. *Saving v. Hoylake Ry. Co.*, L. R. 1 Ex. 9.

EQUITY is the phrase commonly used to designate that portion of the law which is administered by the Courts of Chancery in Lincoln's Inn and at the Rolls. Equity, in this sense, is wider than Law, and narrower than Natural Justice or Natural Equity, in the *extent* of the matters which are the subjects of its jurisdiction. Equity

EQUITY—*continued.*

cannot be defined in its *content*, otherwise than by an enumeration of its various subject-matters, being trusts, mortgages, administrations, &c., &c.

There are, or used to be, three jurisdictions in Equity, namely, the exclusive, the concurrent, and the auxiliary jurisdictions, the *exclusive* jurisdiction being that in which Equity had jurisdiction and Law had not; the *concurrent* that in which Equity and Law had jurisdiction equally; and the *auxiliary* that in which Law had exclusive jurisdiction, and Equity was only the handmaid of Law therein.

EQUITY DRAFTSMAN is a pleader in Equity.

EQUITY FOLLOWS THE LAW. This maxim, which is expressed in Latin by the phrase, *Aequitas sequitur legem*, signifies that the Courts of Chancery follow the same principles in construing documents and in determining rights as the Courts of Common Law, but the rule is subject to a few inconsiderable exceptions, which the Courts of Chancery have, for reasons of their own, thought fit to make, in their application of it.

The following are some illustrations of the general rule:—

(1.) In construing the words of limitation of estates, the same words which at Law confer a life estate do so in Equity also; and the phrase "heirs of the body" gives an estate tail in Equity equally as at Law; and the phrase "heirs and assigns" in like manner gives a fee simple in Equity as at Law.

(2.) In applying the rules of descent, Equity adopts the entire nine canons of descent which regulate the descent of real estate at Law; e.g., primogeniture, coparcenary, &c.

(3.) In applying the statutes for the limitation of actions and suits, Equity never exceeds the limits which the Law prescribes, although, for reasons of its own, it often stops short of the outside limit. See title LIMITATION OF ACTIONS AND SUITS.

The following are the exceptions which Equity has made in its application of the general rule:—

(1.) In the construction of executory trusts, i.e., of trusts incompletely set out in the instrument creating them, if the instrument is either marriage articles or a will containing a reference to marriage, Equity refuses to follow blindfold the rule of Law commonly designated as the *Rule in Shelley's Case* (see that title), whereby the words "heirs of the body" following upon a freehold estate of the ancestor, confer upon the ancestor an estate tail, but chooses rather to mould these words into

EQUITY FOLLOWS THE LAW—*contd.*

the form of a strict settlement, giving to the ancestor a life estate, and securing to the issue of the contemplated marriage a succession of estates, and to the intended wife a jointure or widowhood estate, over which estates the intended husband shall have no power either to defeat or to diminish them (*Trevor v. Trevor*, 1 P. Wms. 622; *Papillon v. Voice*, 2 P. Wms. 571); and

(2.) In the construction of the beneficial or equitable estates of joint tenants, with reference to whom, if they are mortgagees, whether for equal or unequal amounts, and if they are purchasers, for equal amounts (but not also for unequal amounts), Equity refuses to allow survivorship of the equitable estate, and decrees the survivor a trustee for the deceased as to the share of the deceased. *Lake v. Gibson*, 1 Wh. & T. L. C. 160.

EQUITY OF REDEMPTION: See title MORTGAGE.

EQUITY OF A STATUTE: See title INTERPRETATION.

ERROR, WRIT OF. After final judgment had been signed in an action, the unsuccessful party, if desirous of disputing the matter afresh, might bring a writ of error, being a writ which was sued out of the Chancery, and which was addressed to the judges of the Court in which the judgment had been given, commanding them in some cases to examine the record themselves, and in others to send it to another Court of appellate jurisdiction. The error might consist either (1.) in a matter of *fact*, or (2.) in a matter of *law*. (1.) The matter of *fact* must not have been an issue found by a jury (for which the only mode of reconsidering the same was by *motion for a new trial*), but it may have been such a fact as that the plaintiff was a minor, and appeared by an attorney instead of by his guardian, or the fact that the plaintiff, being a married woman, appeared without her husband; and in these and the like cases, the fact going to the validity or regularity of the proceedings, a writ of error *coram nobis* (or *vobis*) was available, that is to say, a writ of error to be tried before the same judges, because the reversal of such an error is not the reversal of the judgment of these judges, but the correction of something not previously brought under their notice. (2.) The error is an error of *law*, when, upon the face of the record, the judges are seen to have committed a mistake of law; and in this case the remedy was by writ of error generally (and not by writ of error *coram nobis* or *vobis*), the writ commanding the record or a transcript thereof to be sent to the Court of appellate jurisdiction,

ERROR, WRIT OF—*continued.*

i.e., to the Court of Exchequer Chamber. To support this writ, the error must have been one of substance, inasmuch as errors of mere form are cured by the Statutes of Amendments and Jeofails (*see* these titles). But, at the present day, the writ of error, in both its varieties, has been abolished; and now, under the C. L. P. Act, 1852, s. 148, error is made a step in the cause, and the Court has the same jurisdiction as upon a writ of error. For bringing error, the limit of six years from the date of signing judgment and entering the same of record is fixed by s. 146 of the last-mentioned Act, an allowance for disability being made by s. 147 of the same Act.

Before bringing error, a bill of exceptions must have been tendered to the judge before verdict, and must also have been certified by his seal being affixed thereto. But, by the Judicature Act, 1873, it is provided that, from and after the 1st of November, 1874, extended to the 2nd of November, 1875, bills of exceptions and proceedings in error shall be abolished. (49th Rule of Procedure.)

ESCAPE. In civil cases, this was defined to be, in general, where any person under lawful arrest either violently or privily evaded such arrest, or was suffered to go at large before he was delivered by due course of law. If the arrest was unlawful, as where the judgment or the writ of execution was absolutely void, then there was no escape.

Such an escape might have been either negligent or voluntary:—

(1.) If the escape was *negligent*, *i.e.*, without the knowledge or consent of the sheriff or his officer, then the escaped person might be pursued and retaken anywhere, and even on a Sunday; and in such a case, if the sheriff or his officer retook the prisoner before any action was brought for the escape, he was excused.

(2.) If the escape was *voluntary*, *i.e.*, with the knowledge or consent of the sheriff or his officer, then the escaped person could never be retaken, but the sheriff was liable for the escape, and also (if it should so happen) for the re-taking.

For an escape, the remedy was either in debt for the full amount of the judgment or on the case for damages; and after the Act 5 & 6 Vict. c. 98, s. 31, the remedy was on the case only, and not in debt. But that remedy, which lay against the sheriff, did not exclude the plaintiff from proceeding against the defendant, either by fresh writ of execution or in an action on the original judgment.

It is conceived that the Law is still the same, but it must be remembered that, by the Act 32 & 33 Vict. c. 62 (the Debtors

ESCAPE—*continued.*

Act, 1869), imprisonment for debt on a *ca. sa.* or on *mesne process* has been abolished with the exceptions in the Act mentioned.

In criminal cases there is no escape.

ESCAPE-WARRANT. This was a warrant granted to re-take a prisoner committed to the custody of the Queen's Prison who has escaped therefrom. It was obtained on affidavit from a judge of the Court in which the action had been brought, and was directed to all the sheriffs throughout England, commanding them to re-take the prisoner and to commit him to gaol when and where taken, there to remain until the debt was satisfied.

ESCHEAT. This word is derived from the French *échoir*, to fall, and denotes that incident of feudal tenure by which the land reverts back to the lord upon the failure of a tenant to do the services. Escheat used to arise from two causes:—
Either

- (1.) *Propter defectum sanguinis, i.e.*, on account of the failure of blood, *i.e.*, heirs, of the grantee; or
- (2.) *Propter delictum tenentis, i.e.*, on account of the felony or attainder of the tenant.

But by the Act 33 & 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* is to cause any attainder or corruption of blood, or any forfeiture or escheat. So that, at the present day, escheat, it appears, can only arise from the failure of heirs of the grantee. Upon an escheat, the lord used to have a *writ of escheat* against the person who was in possession of the lands after the death of his tenant without heirs: and now he has an action of ejectment against him commenced by writ of summons.

ESCHEATOR. The name of an officer who was appointed by the lord treasurer in every county to look after the escheats which fell due to the king in that particular county, and to certify the same into the exchequer. An escheator could continue in office for one year only, and was not re-eligible until the third year from the expiration of his former year of office. There does not appear to exist any such officer at the present day.

ESCROW. Where a deed is delivered conditionally and not absolutely, *e.g.*, where it is delivered not to the grantee personally (or his agent), but to some third person pending the doing of some act which is required of the grantee to be done, such deed is said to be delivered as an *escrow, i.e.*, a mere *scroll*, or writing, which be-

ESCROW—*continued.*

comes a good deed upon the accomplishment of the condition.

ESCUAGE. This word is from the French *écu*, meaning a shield or buckler, and denotes bucklerage, or rather a pecuniary satisfaction paid in lieu thereof. It was a composition offered by knight-tenants to their lord, and accepted by him in lieu of their personal attendance on him in the wars. From being occasional, this composition became general, and ultimately was levied by regular assessments.

ESSOIN. This was an excuse (whether on the ground of illness, *de infirmitate*, or on other ground), for not appearing in Court in pursuance of a summons contained in a writ. The first day of term was called the *essoin day*, or day for hearing excuses. But since 1 Will. 4, c. 70, the *essoin day* has been done away with altogether, the practice of alleging such excuses, *i.e.*, of casting the *essoin* having been discontinued even previously to that Act.

ESTATES. Absolute ownership is an idea quite unknown to the English Law of Real Property; the so-called owner of lands can, at the most, hold only an estate in them. The estate which he holds may, at the present day, be of a very various kind; originally, however, an estate for the man's own life was both the largest and the smallest estate in lands, being in fact the only recognised estate.

The estate for life was originally the largest estate in lands, for the simple reason that the lord would not grant a larger one, the condition of the tenure being, that the tenant should be personally competent to discharge the feudal services annexed to it; and it was originally the smallest estate in lands, for the simple reason that the vassal might in all cases hold for life, conditionally upon his continuing competent to discharge the feudal services. Whence a grant of lands to A. B. was originally a grant to him so long as he personally could hold them, and not longer; in other words, it was an estate for his own life. And to the present day the effect of such a gift when it is made by deed is still the same, conferring an estate for life only, according to the maxim *Verba dant feudo tenorem*; the effect of such a gift even when made by will was equally the same until the year 1838, but as from that year it was enacted by the New Wills Act (7 Will. 4 & 1 Vict. c. 26, s. 28), that such latter gift should, in the absence of a contrary intention appearing on the will pass a fee-simple estate if the testator had that quantity of estate to pass.

ESTATES—continued.

If it was intended that the descendants of the tenant should, at his decease, succeed him in the tenancy, as son to sire, then that intention required, according to the maxim already quoted, to be expressed by additional words of grant, the gift being in that case expressed to be to the tenant and his heirs. This extended form of grant, however, did not originally give the ancestor more than a life estate; he and his heirs, *i.e.*, descendants, were equally nominees in the original grant, and took as a succession of usufructuaries, each of them during his life, and for that period only, enjoying the benefit of the grant. Such was the construction which this form of grant received as far down as the reign of Henry II.; but from causes which were vigorously at work, that construction was abandoned by the reign of Henry III., and a construction adopted in its stead which is very nearly the construction of the present day,—that the ancestor is the alone nominee in the grant and takes a fee simple to himself, with power by subinfeudation and otherwise to defeat or prejudice his issue. The power of alienation, the facility of which is the chief characteristic of the modern fee simple, was not long to follow after, being complete as early as the 18 Edw. 1, c. 1, commonly called the statute *Quia Emptores*. See title **ALIENATION**.

The estate for life was originally *inalienable*, unless where the lord consented to the alienation, or, in other words, to the substitution of a different vassal for the first grantee; but the estate for life gradually became freely alienable without the lord's consent (*see* title **ALIENATION**, *supra*). When an estate for life was aliened in this latter way, the alienee took an estate *pur autre vie*, *i.e.*, during the first grantee's life and not during the life of the alienee himself. Accordingly, the first grantee was in such a case described as the *cestui que vie*, and the alienee was described as the *tenant pur autre vie*.

The estate *pur autre vie* was attended with peculiar incidents. It was subject, like the ordinary estate for life, to the feudal maxim, *Verba dant feudo tenorem*, and therefore when the grant was made to C. D. simply without more, C. D. took a tenancy *pur autre vie* for his own life only. Consequently, C. D.'s estate was doubly liable to determine, depending for its continuance upon the joint existence both of A. B., the first grantee, and of C. D., the alienee, and determining upon the death of either. If it was intended that the grant to C. D. should extend beyond the life of C. D. and throughout the life of A. B., then that intention required, according to the maxim

ESTATES—continued.

already quoted, to be expressed by additional words of grant, the gift being in that case expressed to be to C. D. and his heirs. Now, if the grant were made to C. D. simply without more, and C. D. died leaving A. B. him surviving, the land was left without an owner so long as A. B. lived, the law not suffering A. B. to re-enter after having parted with his life estate. Neither could the lord apparently re-enter. No person having, therefore, a right to the estate, anybody might enter on it; and he that first entered became entitled forthwith to hold the land so long as A. B. lived, and was called the general occupant with reference to the manner in which he had acquired the land. On the other hand, if the grant were made to C. D. and his heirs, and C. D. died leaving A. B. him surviving, the land was not left without an owner so long as A. B. lived; but the heir of C. D. might enter and hold possession so long as A. B. lived, and was called the special occupant with reference to the manner in which he had acquired the land. General occupancy has been abolished, but special occupancy has been preserved, by the Statute of Frauds (29 Car. 2, c. 3, s. 12), and also by the New Wills Act (7 Will. 4 & 1 Vict. c. 26, ss. 3, 6), which have enacted in effect that the owner of an estate *pur autre vie* (apparently whether granted to him simply without more or to him and his heirs) may dispose thereof by will, and failing such disposition the heir as special occupant shall become entitled to it and to the extent thereof be chargeable with the debts of his ancestor: and in case there shall be no special occupant, then the executor or administrator of the deceased testator or intestate is to take possession of the land, and to the extent thereof to be chargeable with the payment of the debts of the deceased. By the Act 14 Geo. 2, c. 20, the surplus (if any) of an estate *pur autre vie* as to which the owner died intestate was made distributable, and by the New Wills Act the same is now distributable among the next of kin of the deceased; and by the Act 6 Anne, c. 18, in a case of *prima facie* concealment of the decease of the *cestui que vie*, with the determination of whose life the estate *pur autre vie*, as already stated, necessarily determines, the person next entitled to the land may upon affidavit of his reasonable belief of such decease obtain an order from the Lord Chancellor for the production of the *cestui que vie* alive, and failing, or until such production, the applicant may enter upon and hold the land.

For the origin of the estate-tail, and the varieties thereof, *see* the next following titles.

ESTATE-TAIL. This is an estate given to a man and the *heirs of his body*.

Growth of the Estate-Tail. The following stages in the growth of the estate-tail may be indicated :—

(1.) Permission was granted to the heirs of the tenant to succeed on the decease of their ancestor ;

(2.) The word *heirs* having acquired about the time of Henry II. a breadth of meaning sufficient to admit *collaterals* to succeed as heirs ;

(3.) It became necessary in order to exclude collaterals to limit the estate expressly to a man and the *heirs of his body* ;

(4.) This limitation to a man and the heirs of his body came to be construed in the Courts as a conditional gift, the condition being that the man should have issue, and so soon as that condition was fulfilled, the estate became an absolute estate in fee-simple : whence

(5.) The statute *De Donis Conditionalibus*, 13 Edward 1 (Statute of Westminster the Second), c. 1, was passed, enacting that the will of the donor, according to the form of the deed of gift manifestly expressed should be from thenceforth observed, or, that the estate should descend according to the form (on *secundum formam doni*), so as that the ancestor should not alien it from his issue nor the donor be defeated of his reversion. This Act created the estate-tail as it at present exists. The further history of that estate is a history of the

Decline of the Estate-Tail. The estate-tail was felt to be inconvenient in many ways, which were probably more sentimental than real, but the opposition of the nobility to the repeal of the statute succeeded in maintaining it intact for about 200 years, when,—

(1.) By the decision in *Taltarum's Case* (Year Book, 12 Edw. 4, 19), by means of a quiet decision, or rather an *obiter dictum*, of the judges, the incident of alienation from the issue, and so as to defeat remaindermen and the reversioner, was annexed to the estate-tail. It was there pointed out, or admitted, that the destruction of the entail might be accomplished by means of judicial proceedings collusively taken against the tenant in tail for the recovery of the lands entailed. The nature and effect of these proceedings will be found stated and explained under the title *COMMON RECOVERY*, which *see*, that being the name by which the proceedings in question were characterised.

(2.) Another mode by which the estate-tail might be barred, but as against the issue only, was the *Fine*, for the history, nature, and effects of which, *see* that title.

(3.) These processes of barring the

ESTATE-TAIL—continued.

entail, namely, Common Recovery and Fine, grew to be felt as cumbrous and inconvenient ; they were also dilatory and expensive ; and accordingly by the statute, 3 & 4 Will. 4, c. 74, a statute passed (it will be observed) at the time of the Reform Bill, 1832, fines and recoveries were abolished, and a simpler mode of assurance was substituted for them. This latter assurance is commonly called a *Disentailing Assurance*, for the nature and effect of which *see* that title.

The so-called *Perpetual Entail* of modern times. There is a popular impression abroad that the entail is perpetual. This is a fallacy, the explanation of which is to be found in the modern artifice of conveyancers, whereby the entail is perpetuated. That artifice consists of the following parts :—

Suppose that A. is tenant for life, and B. his son (as commonly happens) is tenant in tail in remainder expectant on his father's decease, so soon as ever B. attains the age of twenty-one years,—an age at which, or shortly after attaining which, it is probable that B. will marry,—the father and son being on friendly terms with each other, and the father more especially dreading that the inheritance may be dissipated through the son's folly, it is agreed between them to execute a disentailing deed of the estates, and to resettle them to the following uses, that is to say,—

(1.) The father, who is already tenant for life, is to be created tenant for life again ;

(2.) The son who, before executing the disentailing assurance, was tenant in tail, is to be created tenant for life only in remainder expectant on his father's decease ;

(3.) The first grandson (*i.e.*, the first son of the son) being a person not yet in existence, but who may reasonably be expected to come into existence in due course of time, is to be created first tenant in tail of the estates in remainder expectant upon the decease or respective deceases of his father and grandfather, and so on with the second, third, fourth, &c., grandsons.

In this way the entail is pushed off into the next generation ; for the first grandson is the first tenant in tail, and he cannot alienate his estate until he is of the age of twenty-one years at the least, and is not (as already stated) yet in existence. Then when the grandfather of this grandson is dead, and the grandson's father is in possession of the estates, it is clear that the original condition of matters is restored, B. who is now the father being tenant for life, and the grandson who is now the son being tenant in tail. So soon therefore, again, as the son has attained the age of

• ESTATE-TAIL—continued.

twenty-one years, his father and he have only to repeat in their generation what was done in the generation before them; that is to say, execute a new disentailing assurance and re-settle the estates to analogous uses. And thus by means of disentailing assurances and deeds of re-settlement successively executed in each successive generation, the entail of freehold lands in England is popularly regarded as being perpetual, and it is so practically in fact.

ESTATE-TAIL IN PERSONAL ESTATE.

There is no estate-tail in personal estate, whether chattels real or chattels personal; but the words which seem to confer an estate-tail in personality, confer in fact an absolute estate in fee simple. This construction of these words arises from two reasons, namely: (1.) The circumstance that the stat. *De Donis* (13 Edw. 1, c. 1) extended only to real estate, and (2.), the decision in *Leventhorpe v. Ashbie*, Tud. L. C. Conv. 763.

ESTATE-TAIL QUASI. This is an estate-tail improper, and is derived out of an estate for life, when the tenant for life grants his estate to K., and the heirs of the body of K., these words of grant being apt and proper to create an estate-tail; but inasmuch as the estate-tail of K. cannot (as the estate-tail proper may) possibly last for ever, but can last at the most for the life of the tenant for life (or grantor), therefore it is called an estate-tail improper or *quasi*. It further differs from the estate-tail proper in this respect, that it may be barred without the necessity of any inrolment of the deed of disentail in the Court of Chancery (Fearn's Conting. Remrs. 495). On the other hand, it agrees with the estate-tail proper in the course of descent, and also in this respect—that where there is an estate for life prior to the estate-tail *quasi*, then the tenant for life, as being *ex officio* protector, must consent in order to the bar being effective against the remaindermen and reversioners. *Allen v. Allen*, 2 D. & War. 307.

ESTOPPEL. Is a term of law denoting that the person whom it affects is estopped; i.e., stopped or hindered, from saying anything different to what has been already said, even although what he wishes to say is the truth, and the thing already said an error. There are three kinds of estoppels, viz. :—

- (1.) Estoppels by record;
- (2.) Estoppels by specialty; and
- (3.) Estoppels by matters *in pais*.

The principle of, or justification for, the first of these three species of estoppel is, that no one shall aver against a record,

ESTOPPEL—continued.

i.e., a judgment or verdict of the Court, so long as that judgment remained unreversed; and of the second, that a man shall not deny what he has already, with all the solemnity attaching to a deed, affirmed; and of the third, that a man shall not aver the contrary of that which by his previous conduct he deliberately led other persons to infer, and they have inferred accordingly, and would now be prejudiced pecuniarily if the contrary averment were admitted.

The operation of estoppels is *personal*, that is, against the party or parties who are principally affected thereby, their heirs, executors, and administrators; but in the case of an estoppel by record, where the record is a judgment *in rem*, the operation of the estoppel is universal, or (as it is said) against all the world. For particular instances of estoppel of all three varieties, see 2 Sm. L. C. 679.

ESTOVERS. This word, which is derived from the French *étoffer*, to furnish, i.e., stuff, is used to denote certain rights enjoyed by persons who have merely a limited estate or interest in land, being rights necessary to the enjoyment of that estate or interest. There are three kinds of estovers, namely,

- (1.) *Housebote*, being a sufficient quantity of wood for the fuel and repairs of the house;
- (2.) *Ploughbote*, being a sufficient quantity of wood for the making and repairing of agricultural implements; and
- (3.) *Haybote*, being a sufficient quantity of wood for the repair of fences.

It is a rule of law, that estovers must be reasonable; also, that they must be strictly applied to their respective purposes, and to none other. Any excess in the enjoyment or any misapplication of the just amount would be *waste*. *Simmons v. Norton*, 7 Bing. 640.

ESTRAYS. These are such animals of a tame and valuable character as are found wandering, i.e., straying, in any manor or lordship, and are without any apparent owner. The law gives all such animals to the king, but allows him to make grants of them to other persons, and he has in very many cases granted them to the lords of manors, so that they are become incident thereto by special grant.

ESTREAT. This word, which is derived from the Latin *extractum*, denotes a copy or extract from the Book of Estreats, that is to say, the rolls of any Court in which the amerancements or fines, recognisances, &c. imposed or taken by that Court upon or from the accused, and which are to be levied by the bailiff or other proper

ESTREAT—continued.

officer of the Court. Recognizances are said to be *estreated* when they are forfeited by the failure of the accused to comply with the condition of the recognizance, as by failure to appear or otherwise.

ESTREPEMENT, WRIT OF. This was a writ of waste, and lay in particular for the reversioner against the tenant for life, in respect of damage or injury committed by the latter to the lands or woods of the reversioner.

ET HOC PARATUS EST VERIFICARE.

These words were used, when the pleadings were in Latin, at the conclusion of any pleading which contained new affirmative matter; they expressed the willingness or readiness of the party so pleading to establish by proof the matter alleged in his pleading. A pleading which concluded in that manner was technically said to "conclude with a verification," in contradistinction to a pleading which simply denied matter alleged by the opposite party, and which for that reason was said to "conclude to the country," because the party merely put himself upon the country, or left the matter to the jury. But now, by the C. L. P. Act, 1852, s. 67, "no formal conclusion is necessary to any plea, avowry, cognizance, or subsequent pleading."

EVICION. This is the same as dispossession or ouster of the possession (see title **OUSTER**). It is usually applied to ouster from real property only, but it is not inapplicable to the dispossession from personal property also. The covenant for quiet enjoyment which is usually inserted in deeds is in substance a covenant against *eviction*. It is competent also for a landlord to evict his tenant for proper cause; and a landlord may also be guilty of a wrongful eviction of his tenant, as where without proper cause he either actually, i.e., physically, evicts him, or does any act of a permanent character with the intention of evicting the tenant, and which is inconsistent with the latter's returning into or continuing in possession.

EVIDENCE. Is the proof of, or mode of proving, some fact or written document. It is to be considered (1.) In its *Nature*, and (2.) In its *Object*. (A.) With regard to its *Nature*.—Evidence is either primary, or secondary, or presumptive, or hearsay. Admissions are not themselves evidence, but narrow the field which the evidence has to cover.

(1.) *Primary Evidence*.—This is the highest kind of evidence which the nature of the case admits of. Thus, where a will of lands is to be proved, the primary evidence of it is the will itself, and not the

EVIDENCE—continued.

probate; for the Court of Probate has no cognizance of real estate (B. N. P. 246). And where any contract or agreement has been reduced into writing, the primary evidence of it is the writing (*Fenn v. Griffiths*, 6 Bing. 633). But when the narration of an extrinsic fact, i.e., a fact which has arisen independently of the writing, has been committed to writing, the fact may yet be proved by parol, i.e., extrinsic evidence, e.g., a receipt for money (*Rambert v. Cohen*, 4 Esp. 213.) Also, parol admissions are good as evidence against the party making them, although they relate to the contents of a written instrument (*Slatterie v. Pooley*, 6 M. & W. 664). The proper evidence of all judicial proceedings is the proceedings themselves, or an examined copy of them. *Thelluson v. Sheddon*, 2 N. R. 228.

(2.) *Secondary Evidence*.—This is admissible where primary, that is, better, evidence cannot be had, e.g., in the case of a lost deed, upon proof of the loss a copy of the deed is admissible (B. N. P. 254); and so also upon proof of an unsuccessful application to the person who has the legal custody of the deed (*R. v. Stoke Golding*, 1 B. & A. 173). The wrongful refusal of a third person (not being a solicitor) on *subpoena duces* to produce a document in his possession, is, however, no ground for admitting secondary evidence (*Jesus College v. Gibbs*, 1 Y. & C. 156); but it is otherwise in the case of a solicitor who so refuses (*Hibbert v. Knight*, 2 Ex. 11). In some cases, secondary evidence of oral testimony is admitted, e.g., where the testimony of a witness on a former trial is admitted on another trial without producing the witness in person, as where a witness was examined in a former action on the same point between the same parties and he is since dead (B. N. P. 242), or is kept away by contrivance (*Green v. Gaterwick*, B. N. P. 243). So, also, upon an examination *de bene esse* (which see). And see title **NOTICE TO PRODUCE**.

It is commonly said, that there are no degrees of secondary evidence. This means, that when secondary evidence is admissible at all, upon failure to produce the original document, no restriction is put upon the party producing the evidence as to the kind of evidence he shall produce for that purpose; but if it was apparent that more satisfactory evidence might be produced than is produced, the jury or a judge will be influenced by that consideration (*Doe d. Gilbert v. Ross*, 7 M. & W. 102). And there is one exception to the rule, namely, where by statute a special kind of secondary evidence is substituted for the original.

EVIDENCE—continued.

(3.) *Presumptive Evidence.*—This kind of evidence is so called in contradistinction to direct or positive proof whether oral or written; it is not of the nature of secondary evidence, and does not therefore require in order to its admissibility any preliminary proof that positive or direct evidence cannot be procured (*Doe d. Welch v. Langfield*, 16 M. & W. 513). The commoner classes of presumptions are the four following, namely:—

- (a.) Presumptions which admit of no contradiction by contrary evidence, and which are thence called *juris et de jure*;
- (b.) Presumptions which the Court or a judge will direct the jury to presume, although no evidence thereof has been given, and which are thence called *juris* only;
- (c.) Presumptions as to which the jury are left entirely to themselves, being cases in which direct proof of one fact is given with the intention that the jury may from it presume another fact (*Fryer v. Gathercole*, 4 Ex. 262); and
- (d.) Presumptions that the testimony of a witness who might be, but is not, called, is unfavourable to the party who omits to call him.

For examples of these various kinds of presumptions, see 1 Tayl. Evidence, p. 85; Rosc. Evid. at N. P., p. 38.

(4.) *Hearsay.*—As a general rule, hearsay, i.e., the declarations of persons not made upon oath when repeated on oath by a witness who heard them, are not admissible as evidence. There are, however, some exceptions to this general rule; thus, hearsay is admissible in the following cases:—

- (a.) In questions of pedigree, in which questions the declaration (whether oral or written) of deceased members of the family are admissible to prove, e.g., legitimacy, marriage, the date of marriage, the number of children, &c. Entries in a family bible fall under this head. Nor is it necessary that the declarations should be contemporaneous with the facts declared, or even that the declarant should have any personal knowledge of the fact, provided he had it of a relation (*Monkton v. Att.-Gen.*, 2 Russ. & My. 159). But the relative whose declarations are offered must be proved to be dead before they can be admitted in evidence (*Butler v. Viscount Mountgarret*, 7 H. L. C. 733); moreover, in proving RECENT events, such as the death, place of birth,

EVIDENCE—continued.

age, &c., of a person, where that fact is directly in issue, *strict* evidence thereof is required. And any declarations made *post litem motam* are inadmissible. *Berkeley Peerage*, 4 Camp. 401.

- (b.) In questions of public rights, being rights of a pecuniary nature; and the reasons for the admission are various, being either that the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof, or that in local matters persons residing in the neighbourhood and interested in the rights are likely to be acquainted with them, or that such matters are likely to be the subject of frequent conversation. Such evidence is most commonly admitted for the following purposes:—

- (1.) To prove the extent of a manor.
- (2.) To prove the boundaries between parishes or manors.
- (3.) To prove the existence of a ferry, &c.

But to prove a prescriptive right which is strictly private no such hearsay is admissible. *Morewood v. Wood*, 14 East. 327.

- (c.) As forming part of the transaction (*res geste*), and as being not evidentiary but explanatory thereof. Thus, the accompanying declarations may serve to shew the *animus* of the actor, when that is material (*Bateman v. Bailey*, 5 T. R. 512); also, generally, the feelings or sufferings of the party (*Thompson v. Trevanion*, Skin. 402; but see the *Gardiner Peerage Case*, Le March. Rep. 174-6). The admissibility of the declaration in such cases depends not alone upon its accompanying an act, but on the light which it throws upon an act which is in itself relevant and admissible evidence. *Wright v. Doe d. Tatham*, 7 Ad. & E. 313.

- (d.) As being acts or assertions of ownership; but a mere declaration of right, coupled with no other act or actual exercise of it, proved or presumable, is inadmissible as evidence in favour of the right asserted, except as against the party making the declaration and persons claiming under him.

- (e.) As being the declarations of persons who have no interest to misrepresent the truth; but the absence of interest will not alone entitle such

EVIDENCE—continued.

declarations to be admitted as evidence. *Sussex Peerage*, 11 Cl. & F. 85.

(f.) As being the declarations of persons having an interest adverse to their own declarations. See *Barber v. Ray*, 2 Russ. 67, n; *Higham v. Ridgway*, 10 East, 109.

(g.) As being entries, &c., made in the regular course of business, e.g., a notice indorsed as served by a deceased clerk in an attorney's office is evidence of service (*Doe d. Patteshall v. Turford*, 3 B. & Ad. 890); and, again, contemporaneous entries by a deceased shopman in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Lord Torrington*, 1 Salk. 285.

(5.) *Admissions*.—These are as good as primary evidence of the fact or facts admitted; and one letter may be used against the writer of it without producing the rest of the correspondence (*Barrymore v. Taylor*, 1 Esp. 326). But, except in cases of estoppel, the party prejudiced by the admission may prove that it was made under a mistake or misapprehension of law or of fact (*Newton v. Liddiard*, 12 Q. B. 925); and in that manner diminish the prejudice occasioned by it. And, generally, letters marked "without prejudice," and the replies to such letters, although the replies should not be marked "without prejudice," cannot be used as admissions or as evidence (*Hoghton v. Hoghton*, 15 Beav. 278); and admissions made with a view to a compromise are not available against the person making them (B. N. P. 236). A compulsory admission, e.g., in the answer to a bill in Chancery, is available against the person putting in the answer, even in another suit instituted by a different plaintiff, and, *a fortiori*, if instituted by the same plaintiff, or in the very suit in which the answer has been put in (*Fleet v. Perrens*, L. R. 1 Q. B. 536). A party's statement on the record is evidence against him, although it purport to be the statement of a written document, the contents of which are directly in issue in the cause. *Slatterie v. Pooley*, 6 M. & W. 664.

The uncontradicted statements of any one made in the presence and hearing of the party against whom they are offered are evidence of a matter reasonably within the party's knowledge, at any rate where it was within his power to contradict the statements and he did not do so; but no such consequence follows from the mere omission of a party to reply to a letter, unless the writer was entitled to an answer.

EVIDENCE—continued.

The acknowledgment in a deed of the receipt of money is conclusive evidence, both at Law and in Equity, as between the parties to it of such receipt (*Baker v. Dewey*, 1 B. & C. 704), unless upon proof of fraud. But the acknowledgment indorsed on the deed is not conclusive (*Straton v. Rastall*, 2 T. R. 366). A receipt not under seal is, on the other hand not in general conclusive, and may be contradicted (*Graves v. Key*, 3 B. & Ad. 318). But a receipt may amount to an allowance of a sum or sums of money, and in that case is of value in itself, although no money has been paid. *Branston v. Robins*, 4 Bing. 11.

By the O. L. P. Act, 1852, s. 117, either party may call on the other by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proof shall be paid by the party neglecting or refusing, whatever may be the result of the cause, unless the judge at the trial shall certify the refusal to be reasonable; and no costs of proof shall be allowed unless such notice has been given, except where the omission to give such notice is, in the Master's opinion, a saving of expense. This is a simplification of the former practice (Rule of Practice, H. T. 4 Will. 4), under which a judge's order to admit was required. The provisions of the O. L. P. Act, 1852, are applicable to every document, whether in the custody or control of the party or not. *Rutter v. Chapman*, 8 M. & W. 388.

(B.) With regard to its *Object*.—The object of evidence being to prove the point in issue between the parties, there are three general rules, viz. :—

- (1.) That the evidence be confined to the issue;
- (2.) That the substance only of the issue need be proved; and,
- (3.) That the burden of proof lies upon the party asserting the affirmative, in the absence of any presumption of law the other way.

In consequence of the first of these three general rules evidence of collateral facts is excluded (*Holcombe v. Heuson*, 2 Camp. 391); unless where the collateral fact is material to the issue, e.g., in an action by a rector for tithes, where the issue is the existence or not of a farm *modus* (*Blundell v. Howard*, 1 M. & S. 292). So, also, upon the general questions of skill, knowledge, or capacity (*Folkes v. Chadd*, 1 Phill. Ev. 276). But proof of a customary right in a particular manor or parish is, as a general rule, no evidence of the like customary right in an adjoining manor or parish (*Somerset (Duke) v. France*, 1 Str. 661); but if the manors or parishes are first proved to be held under the same

EVIDENCE—continued.

tenure the case would be different (*Rowe v. Brenton*, 8 B. & C. 758). And evidence of general damages, although no part of the issue, is admissible; and evidence of character, as connected with the question of damage, is also in some cases admissible.

Where under R. G., H. T. 1853, r. 19, and the C. L. P. Act, 1852, s. 25, the plaintiff has delivered (or has indorsed on the writ of summons) particulars of his demand, he will be precluded from giving any evidence of demands not contained therein. *Wade v. Beasley*, 4 Esp. 7; *Hedley v. Bainbridge*, 3 Q. B. 316.

In consequence of the second of the three before-mentioned general rules, variances or apparent variances which are immaterial require no amendment; e.g., on a count against a sheriff for a voluntary escape, it is enough to prove a negligent escape (*Banafous v. Walker*, 2 T. R. 126). And if a plea of justification is divisible, e.g., in an action of trespass, it is enough if so much of the plea is proved as is necessary to cover so much of the plaintiff's declaration as is proved, notwithstanding that the whole plea may have been put in issue by the replication (*Spilsbury v. Micklethwaite*, 1 Taunt. 146). And now, by C. L. P. Act, 1852, s. 75, all pleadings capable of being construed distributively shall be so taken; and upon issue being taken thereon, if so much thereof as shall be a sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant as to so much, and for the plaintiff as to the residue. With regard to the use of a *videlicet*, or *scilicet*, that may or may not dispense with proof of the precise particulars as stated, according as those particulars as stated are material or not. See also title VARIANCES.

With reference to the third of the three before-mentioned general rules, the burden of proof, see title ONUS PROBANDI.

See also titles EXTRINSIC EVIDENCE; INTERPRETATION; and WITNESSES.

EXAMINATION : See WITNESSES.

EXAMINER. An examiner in Chancery is an officer of the Court of Chancery appointed (1.) to take the depositions of unwilling witnesses when notice of motion for decree has been given, such examination being taken in the presence of all the parties, and the cross-examination and re-examination to follow there and then; (2.) to take the like depositions where issue is joined, i.e., when replication has been filed in any cause, such examination being taken *ex parte*, and the cross-examination and re-examination afterwards coming on before the Court itself. There

EXAMINER—continued.

are at present two such examiners, but a special examiner is occasionally appointed.

See also title DEPOSITIONS.

EXCEPTION. In conveyancing means an exception of part of the thing granted, being a part which is less than and severable from the whole, and which is of such a nature that it may be held by itself. In the grant of a manor, the exception of the Court Baron would be void, that being an incident inseparable from the manor; and, again, in the like grant, an exception of the profits of the manor would be void, as being repugnant to the grant.

In the grant of land, on the other hand, an exception of all mines and minerals thereunder would be a valid exception; and such an exception is also sometimes (although less accurately) called a *reservation* of the mines and minerals. A reservation, however, properly denotes the creation of some new hereditament, e.g., a rent; whereas an exception is only a slice (so to speak) of the old hereditament.

EXCEPTIONS. Exceptions to an answer to a bill in Chancery are objections taken to it on the ground either of insufficiency or of scandal; or formerly (i.e., prior to 1852) on the ground of impertinence. The objections are stated in the form of a written pleading. However, under the Judicature Act, 1873, this form of taking these objections is superseded (Sch. rule 25), and the Court is to dispose of the allegation of insufficiency in the answer upon motion in a summary way.

EXCEPTIONS, BILL OF : See ERROR.

However, bills of exceptions and proceedings in error are abolished by the Judicature Act, 1873 (Sch. rule 49).

EXCHANGE : See title CONVEYANCES.**EXCHEQUER BILLS AND BONDS.**

These are regulated by stats. 17 & 18 Vict. c. 23, and 29 & 30 Vict. c. 25.

EXCHEQUER, COURT OF. This Court was the first offshoot from the *Aula Regis*, and was established by William I. for revenue purposes, and afterwards regulated by Edward I. The Court took its name from the table at which the judges sat, which, Camden says, was covered with a *chequered* cloth resembling a chess-board and serving as a counter. Its jurisdiction continued to be principally matters in which the king's revenue was either really, or by means of the fiction *quo minus*, fictitiously, in question; but it acquired also some Equity jurisdiction. By the stat. 5 Vict. c. 5, its jurisdiction in Equity has been taken away, and under the Uniformity of Process Act (2 Will. 4, c. 39), its present

EXCHEQUER, COURT OF—*continued.*

jurisdiction does not materially differ from that of the other co-ordinate Courts of Common Law.

See also title **COURTS OF JUSTICE.**

EXCHEQUER CHAMBER. At the time that the Court of Exchequer had an Equity jurisdiction, the Lord Chief Baron, when administering Equity, sat apart in a chamber called the Exchequer Chamber, and that was the original character of the Court so called as constituted by the stat. 31 Edw. 3, st. 1, c. 12. But since the Equity side of the Court of Exchequer was abolished by the stat. 5 Vict. c. 5, the name Exchequer Chamber has been used, more especially since the Act 11 Geo. 4 & 1 Will. 4, c. 70, in revival, apparently, of a much earlier statute, 27 Eliz. c. 8, to designate the Court of Appeal which is next above the Courts of Queen's Bench, Common Pleas, and Exchequer, and intermediate between these Courts and the House of Lords.

See also title **COURTS OF JUSTICE.**

EXCISE: See title **REVENUE**, and stat. 29 & 30 Vict. c. 64, intitled "An Act to amend the Laws relating to the Inland Revenue."

EXCOMMUNICATO CAPIENDO. A writ which issued to the sheriff of the county commanding him to take an excommunicated person and imprison him in the county gaol, because within forty days after the sentence had been published in the church the offender would not submit and abide by the sentence of the Spiritual Court. And he remained in prison until he was reconciled to the Church, and such reconciliation was certified by the bishop; upon which another writ, *de excommunicato deliberando*, issued out of Chancery to deliver and release him; but when such person would not become reconciled, but still remained obstinate in resisting the sentence of the Spiritual Court, and afterwards had been unlawfully delivered from prison before having given caution to obey the authority of the Church, then a writ *excommunicato recipiendo* was issued commanding the sheriff to seek after the offender and imprison him again (Reg. Orig. 67; F. N. B. 62.). The ecclesiastical punishment of excommunication, or by means of other spiritual censures, appears to have become tacitly abolished, although it is true the stat. 27 Geo. 3, c. 44, limiting prosecutions for brawling and fornication, still remains in the statute book as revised.

EXECUTE. As applied to deeds and other documents, this word denotes to sign, seal, and deliver same, or to sign same, as the case may be. As applied to

EXECUTE—*continued.*

writs, the word denotes the act of the sheriff in carrying out the command of the Court contained in the writ. Such a writ is called a *writ of execution*. As applied to criminals condemned to suffer death, the word denotes the act of the executioner in putting the criminal to death. But in each of these three applications, and in every other application, of the word, there is the same meaning; namely, that of completing or perfecting what the law either orders or validates.

EXECUTION, WRIT OF. This is a judicial writ issuing out of the Court where the record or other judicial proceeding is on which it is grounded. It usually issues at the end of fourteen days from the verdict, but it may for good reason be either expedited or delayed; and it may issue within six years after the recovery of the judgment, without getting the judgment revived.

The writ of execution is either a *fi. fa.*, an *elegit*, or a *ca. sa.*; and the plaintiff may sue out either he pleases, and after suing out one, he may abandon it before execution and sue out another; or he may even have several writs running at the same time, either of the same species into different counties, or of different species into the same or different counties. But only one of such writs must be actually executed. If part only of the amount be levied on the one writ so actually executed, then the writ must be returned; and *after the return* another writ may issue.

By the C. L. P. Act, 1852, s. 121, the writ should be directed to the sheriff of the county in which it is to be executed. If it is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which such liberty or franchise is situate. And by s. 134 of the same Act the writ if unexecuted does not remain in force for more than one year from the teste of the writ, unless it is renewed.

See also titles **CAPIAS AD SATISFACIENDUM**; **ELEGIT**; and **FI. FA.**

EXECUTOR. This word is commonly applied to wills, and as so applied it denotes the person who undertakes the execution of the will. An executor is of two kinds being either,—

- (1.) A lawful executor; or
- (2.) An executor *de son tort*.

(1.) It is incumbent on a lawful executor to collect, get in, and realize all the personal estate of the testator, and if desirable for the more lucrative realization thereof it is his duty to carry on or continue the trade or business of the testator, which he may do with safety under the direction of

EXECUTOR—continued.

the Court of Chancery. For this latter purpose executors may carry out their testator's contracts, and, as a rule, should endeavour by all means to do so. But an executor is not bound to insure or to keep up an insurance against fire. Under the stat. 23 & 24 Vict. c. 145, s. 30, he has a right to compound debts. When the estate is realized, for which purpose he is allowed a year, thence called the executor's year,—his next duty is to divide or distribute the estate among the legatees (as to whom see title LEGACY). But before making any such distribution, it is incumbent upon him to pay or provide for the funeral and testamentary expenses of the deceased, and all his just debts, otherwise he will be personally liable therefor as for a *devastavit* (see that title), assuming that there was a sufficiency of assets to pay them.

It is competent to an executor to renounce probate of the will, and in that case his right as executor wholly ceases. But, assuming that he has obtained a grant of probate, he and he only is entitled to act as executor until the grant is revoked.

With reference to the question in what cases an executor is entitled to sue, or is liable to be sued, as executor, or in his own personal capacity, there is a clear line of division, namely the death of the testator; and as to all contracts which had their commencement on the one side of that line, i.e., during the life of the testator, the executor is entitled and liable in his representative capacity only; but as to all contracts which had their commencement on the other side of that line, although these contracts are incidental to the contracts of the testator, the executor is entitled and is liable in his own personal capacity.

All the rules stated above regarding a lawful executor hold true, *mutatis mutandis*, for an administrator also.

(2.) A person becomes an executor *de son tort* from almost any intermeddling with the estate after the death of the testator; e.g., where A., the servant of B., sold the goods of C. the testator, as well after his death as before, though by the orders of C., and paid the money arising therefrom into the hands of B., the latter was held liable to be sued as executor *de son tort* (*Padget v. Priest*, 2 T. R. 97). So also living in the house and carrying on the trade of a deceased victualler was held to be a sufficient intermeddling to make an executor *de son tort* (*Hooper v. Summersett*, Wightw. 16). Where there is also a lawful executor, the act of an executor *de son tort* is good against him only when it is lawful, and such an act as the lawful executor was bound to perform in the due course of administration (*Buckley v. Barber*, 6 Ex.

EXECUTOR—continued.

164). But it is evident that an act of intermeddling may be sufficient to make a person liable as executor *de son tort*, although it should not bind the lawful executor. *Thompson v. Harding*, 2 El. & Bl. 630.

EXECUTORY AND EXECUTED. These words denote respectively *incomplete* and *complete*, and that as well in their Common Law application to *contracts*, as also in their Equity application to *trusts*. Thus (1.) In the case of *contracts*.—The contract or consideration is said to be executed when it is completely performed; and it is said to be executory when it is not yet completely or only incompletely as yet performed. And it is clear that a contract may be executed on one side and executory on the other. In the case of executory contracts, a request to perform, together with the consequent promise to pay for the performance is always implied by law, where it is not expressed in words by the parties; but in the case of executed considerations, this is not always so, although sometimes it is so; and as to when it is and when it is not so, see title CONTRACT.

And (2.) In the case of *trusts*.—A trust is said to be executed when it is completely created or declared, and executory when the words of trust are merely directory, and point to some further instrument as being necessary to complete the declaration or creation. Many distinctions are made in Equity according as a trust is executed or executory. Thus, Equity follows the Law in applying, for example, Shelley's Rule to trusts that are executed; but as to trusts executory it takes this distinction, viz., if the instrument containing the executory trust contains a reference to marriage, Equity refuses to follow Shelley's Rule, and moulds the trusts so as best to suit the presumed intention of the testator; but where there is no such reference to marriage, then Equity permits the Law to have its own way. And, again, an executory trust which exceeds the rule against perpetuities, is not therefore void (as an executed one would be), but Equity will mould the executory trust so as to confine it within that rule of Law, believing that the testator could not intend what was illegal.

EXEMPLIFICATION. In law is an official copy or transcript made from a record of Court: thus, an exemplification of a *recovery* signifies a copy or transcript of the recovery roll, and the same should be set out *litteris et verbis* in an abstract of title comprising it. Similarly, an exemplification of *letters patent* signifies a copy or transcript of letters patent made from the original enrolment.

EXHIBIT. An exhibit is the name given to any particular document which in the course of a cause is *exhibited*, i.e., produced by either party. Such documents, when numerous, are usually marked with some letter of the alphabet as a convenient mode of referring to and distinguishing them, and they are then called "Exhibit A," or "Exhibit B," and so forth.

This use of exhibits is a convenient mode of abridging evidence in the case of written documents, the proof being either *vidæ voce* or by affidavit. But only some documents may be exhibited, namely, extracts from registries, records from the Bodleian and Museum libraries, and generally all documents coming out of the custody of a public officer having care of them; also, office-copies of records, whether of the Superior Courts at Westminster or of the Courts of the County Palatine of Lancaster, or of the Inferior Courts of Record; also, and chiefly, deeds, bonds, notes, bills of exchange, letters, or receipts, and the like. Documents of other kinds may not be so proved; and generally, no document may be proved as an exhibit, if it requires more to substantiate it than the proof of the execution or of handwriting, e.g., if any ulterior circumstance which might affect it requires to be proved, and the opposite side would have a right to cross-examine upon that circumstance (*Lake v. Skinner*, 1 J. & W. 9, 15). Thus, a will of real estate could not generally be proved as an exhibit at the hearing, but under the present practice that is allowed to be done, the heir having liberty to cross-examine the witnesses.

If it is intended to prove an exhibit at the hearing of the cause, an order of course to be obtained on motion of course or petition of course at the Rolls is necessary.

EXPROPRIATION. In French Law, is the compulsory realization of a debt by the creditor out of the lands of his debtor, or the usufruct thereof. When the debtor is co-tenant with others, it is necessary that a partition should first be made. It is confined in the first place to the lands (if any) that are in *hypothèque* (see that title), but afterwards extends to the lands not in *hypothèque*. Moreover, the debt must be of liquidated amount.

EXTENT. Is a writ of execution available in cases in which the Crown has an interest. The extent may either be an extent *in chief* or an extent *in aid*, the distinction being that the former is a hostile proceeding by the Crown against its debtor, or against the debtor of that debtor, while the latter is an extent issued at the instance of the Crown debtor himself against his debtor, to aid his payment of the Crown debt. The extent of the

EXTENT—continued.

Crown has priority over all executions of the subject.

See also title CROWN DEBTS.

EXTINGUISHMENT. Is the destruction of an estate, or right, or power. A debt is said to be extinguished by payment, and a tort by satisfaction, according to the general maxim, *Omnia judicicia absolutoria esse*.

See also titles POWERS; RIGHTS, &c.

EXTORTION. Is a criminal offence when committed by sheriffs or other officers; but, *semble*, a more civil injury, when committed by other persons, against whom an action for money had and received will lie.

EXTRADITION. Denotes the giving up of a criminal by a foreign state in which he has sought refuge from prosecution to the state within whose jurisdiction the offence has been committed. The duty of a state to make extradition of criminals is by no means generally admitted, and at the most it is an exercise of comity only. Generally, no state will make an extradition of its own subjects; and generally, also, no state will make an extradition of political offenders. The present practice of England with regard to the extradition of criminals is expressed in the Extradition Act, 1870 (33 & 34 Vict. c. 52), and the Extradition Act, 1873 (36 & 37 Vict. c. 60), which provide that when an arrangement for that purpose has been made with any foreign state, Her Majesty may by Order in Council direct that the Act shall apply in the case of such foreign state, subject to any conditions to be expressed in the order. But the former Act makes an express exception of political offences, the Secretary of State having it in his discretion to decide whether the offence is or not of a political nature. The Act of 1873 extends the provisions of the principal Act to the case of accessories punishable as principals. See generally Clarke on Extradition, 1874.

EXTRINSIC EVIDENCE. This evidence is so styled because it is brought forward to throw light upon a written instrument *ab extra* the instrument. The usual rule of law being that the meaning of the instrument is to be gathered from the instrument itself, the introduction of extrinsic, or (as it is sometimes called) parol, evidence to assist in ascertaining its meaning, is to be regarded in the light of an exception.

It may be premised generally, that by a rule of the Common Law, independently of statute, extrinsic or parol evidence was equally inadmissible in certain cases to throw light upon a written document; and that the Statute of Frauds, and other statutes which have made writing an ab-

EXTRINSIC EVIDENCE—continued.

solute *sine qua non* to the validity of certain obligations, have not been the occasion of the inadmissibility of this species of evidence, but have at the most only rendered that inadmissibility somewhat more patent (*Goss v. Lord Nugent*, 5 B. & Ad. 58). Thus, before the Statute of Frauds, the Courts were uniformly governed by the rule—that the judgment of a Court or judge in expounding a will should be simply *declaratory* of what is in the instrument (Wig. Extr. Ev. p. 6); and since that statute the rule is the same, only more apparently so than before, inasmuch as the admission of evidence to do more than to declare what is in the will, would be, to the extent the evidence was admitted, to be in fact making an additional or other will for the testator which he has not made. The question is, what has the testator written, not what (in any one's opinion) he *intended* or *ought* to have written.

(A.) Considering the matter, firstly, with reference to *Wills*. The following are the uses to which extrinsic or parol evidence may be legitimately applied:—

(1.) Where there is nothing in the context of a will shewing that the testator has used words in other than their strict or primary acceptation, but that acceptation is insensible with reference to extrinsic circumstances, then the extrinsic circumstances may be looked at for the purpose of arriving at some secondary or popular sense which shall be sensible with reference to these circumstances.

(2.) Where the written characters of the will are difficult to decipher, or the words of the will are in an unknown or unusual language, the evidence of persons experienced in deciphering written characters or acquainted with the language is admissible for the purpose of informing the Court or judge.

(3.) Extrinsic evidence is also admissible for the purpose of identifying the *object* of the testator's bounty (whether devisee or legatee), and for the purpose of identifying the *subject* of disposition.

(4.) Also, for the purpose of defeating a fraud, whereby either the wrong will is executed or an alteration in or omission from the true will is occasioned. *Doe v. Allen*, 8 T. R. 147.

On the other hand, extrinsic evidence will not be admissible for the following purposes:—

(1.) To *add* to the contents of a will, by proof of a mistake of the testator (*Brown v. Selwin*, Cas. t. Talb. 240), or of the counsel who prepared the will (*Newburgh (Earl) v. Newburgh (Countess)*, 5 Mad. 364, 1 M. & Scott, 352; but an issue *deviseavit vel non*, where that will serve the same purpose (as

EXTRINSIC EVIDENCE—continued.

it would have done in *Newburgh v. Newburgh*, *supra*) may be directed.

(2.) To supply a total *blank* in the will, whether of the name of the legatee or devisee, or of the amount of the legacy or estate given. *Doe v. Needs*, 2 M. & W. 139; *Edmunds v. Waugh*, 4 Drew. 275.

(3.) To identify a legatee or devisee or the estate given, where there being some description, no part of that description is applicable to any person or estate. *Hampshire v. Pierce*, 2 Ves. 218; *Miller v. Travers*, 8 Bing. 244.

And generally, although the judgment of the Court or a judge in expounding a will should be simply *declaratory* of what is in the will, yet—

(1.) Every claimant under a will has a right to require that the Court or judge shall, by means of extrinsic evidence, place itself or himself in the situation of the testator, the meaning of whose language it or he is called upon to declare; and

(2.) The *intention*, as an independent fact, may be proved by means of the like evidence in all those cases in which the description being *accurate*, i.e., unambiguous on the face of it, its applicability to each of several subjects, or to each of several objects, occasions what is called a latent ambiguity. See also titles **LATENT AMBIGUITY**; **PATENT AMBIGUITY**.

(B.) Considering the matter, secondly, with reference to other instruments than wills. The following is an enumeration of the purposes for which extrinsic evidence in connection with written documents may be admitted:—

(1.) To prove the making of the contract;

(2.) To prove the writing not to have been a contract;

(3.) To prove that the contract was induced by fraud, mistake, or duress;

(4.) To prove that the writing was signed conditionally;

(5.) To annex to the contract usages of trade not inconsistent with the express terms thereof;

(6.) To explain terms of a technical trade significance;

(7.) To identify the parties and also the subject-matter; and

(8.) To prove that the contract is illegal.

See Wigram on Extrinsic Evidence; Leake on Contracts, pp. 106-125.

F.

FACTOR. Is a commercial agent, enjoying certain privileges that are peculiar to him, and not common to agents generally.

FACTOR—*continued*.

These privileges are due in some measure to the circumstance that the factor is in a position that is analogous to that of the consignee of goods. Thus, he was able by the Common Law to bind his principal by the sale of the goods entrusted to him, and he still has that power; but he could not pledge the goods in a valid manner. However, under the stat. 6 Geo. 4, c. 94, usually called the Factors' Act, he is enabled to make a valid pledge of the goods, or of any part thereof, to one who believes him to be the *bond fide* owner of the goods; and under the stat. 5 & 6 Vict. c. 39, he is further enabled in all respects, as if he were the true owner of the goods, to enter into any contract or agreement regarding them by way of "pledge, lien, or security," as well for an original loan, advance, or payment made on the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement is made valid against the principal, notwithstanding the lender was fully aware that the borrower was a factor only. This power does not extend to antecedent debts.

FACTORIES. Are placed under statutory supervision; the stat. 42 Geo. 3, c. 73, regulating the health and morals of apprentices and others employed therein, the stat. 3 & 4 Will. 4, c. 103 (Factory Act, 1833), amended by the Factory Acts, 1844 and 1856, regulating the labour of children and young persons therein. And under the stat. 30 & 31 Vict. c. 103, the meaning of the word "factory" is, for the purposes of these Acts, extended to smelting works, copper mills, iron and brass foundries, and to paper, glass, and tobacco manufactories, and to letterpress printing and bookbinding.

The employer of labour in factories is also subject, even by the Common Law, to make due provision, *e.g.*, by properly fencing his machinery, for the security of the lives and limbs of his workmen. *Coe v. Platt*, 7 Ex. 460.

FACULTY (*facultas*). A privilege or special dispensation granted to a man by favour and indulgence, permitting him to do that which by the law he could not do; as to marry without banns being first published; to hold two or more ecclesiastical livings at the same time; and the like (25 Hen. 8, c. 21; *Les Termes de la Ley*). At the present time a faculty is not unfrequently granted for the removal of a churchyard or church; as to which see 32 & 33 Vict. c. 94.

FAIRS: See title MARKET.

FAIT. This word was used in the old law to signify a deed, *factum*. In juris-

FAIT—*continued*.

prudence, the phrase *fait juridique*, or *factum juridicum*, denotes one of the factors or elements constitutive of an obligation.

FALDAGE, called also **FOLDAGE**. Is a privilege enjoyed by certain lords of manors and others of setting up folds, *i.e.*, inclosures, for sheep, as well belonging to themselves as to their tenants, in order with the manure thereof to fatten their lands. The privilege is sometimes called suit of fold, *secta faldæ*. The tenant by paying a fald-fee might have commuted the privilege.

FALSE IMPRISONMENT. An action will lie for false imprisonment as well against officers exceeding the process of the Courts as also against private individuals assuming to imprison. For the success of the action it is necessary to prove both malice on the part of the defendant and the absence of all reasonable or probable cause.

See also title MALICIOUS ARREST.

FALSE JUDGMENT, WRIT OF. This was a writ which lay to the Superior Courts at Westminster to rehear and review a case which had been tried in an inferior Court, and the judgment in which was submitted to be erroneous. In lieu of this writ, an appeal is open to the party dissatisfied with the judgment. See Judicature Act, 1873.

FALSE REPRESENTATION: See titles FRAUD; WARRANTY.

FALSE RETURN: See title RETURN.

FALSIFY. This word, as occurring in the phrase "with liberty to surcharge and falsify," means to impugn as false or erroneous certain items or entries in an account. The Court of Chancery, where an account has been stated between parties, and they afterwards disagree regarding it, may either open the whole account or (according to the nature of the case) merely give liberty to surcharge and falsify particular items in the account.

See also title SURCHARGE.

FARM. This is the old Saxon *feorme*, and signifies a *provision*. Anciently, rents were reserved in provisions, such as corn, poultry, and the like, a money equivalent not having been finally introduced until the time of Henry I. Originally, therefore, farm meant *rent*, and by a natural transposition it now means the land out of which the rent issues.

See also title LEASEHOLD.

FIDELTY. This word signifies fidelity, the phrase "feal and leal" meaning simply faithful and loyal. Tenants by knights' service and also tenants in socage were re-

FALTY—*continued.*

quired to take an oath of fealty to the king or other their immediate lords; and fealty was one of the conditions of their tenure, the breach of which operated a forfeiture of their estates.

FEE. According to Spelman, this is the right which the vassal has in lands to use the same and take the profits thereof to him and his heirs, rendering to his lord the due services therefor. Fees were either Fee Simple or Fee Tail, the former being a simply, i.e., generally, inheritable estate, open to heirs *general*, the latter being also an inheritable estate, but in a limited, i.e., tailed manner only, to wit, open to lineal descendants only, or issue or heirs of the body.

See title ESTATES.

FEE FARM. This is a species of holding or tenure, of a mixed nature, partly freehold and partly leasehold only. It corresponds as nearly as may be to the *Emphyteusis* of Roman Law, which title see; and for fee farm rent, see title RENTS.

FEE SIMPLE: See title ESTATES.

FEE TAIL: See title ESTATE-TAIL.

FEIGNED ISSUE. This was a fictitious issue, or rather a true issue raised by means of a simple fiction. The fiction raising it was resorted to in order to obviate the expense and delay of pleadings; e.g., the plaintiff by a fiction declared that he laid a wager of £5 with the defendant that certain goods were his (the plaintiff's) goods, and then averred that the goods were his; whereupon the defendant, admitting the feigned wager, averred that the goods were not the plaintiff's goods, thus raising at once the issue as to the plaintiff's property in the goods. These feigned issues used to be largely resorted to in Courts of Equity, and not unfrequently also, in interpleader suits, in Courts of Law. But by the Act 8 & 9 Vict. c. 109, s. 19, for the trial of any question of fact, the Court is to direct a writ of summons to be sued out by the proper party against the proper party, in the form set forth in the schedule to the Act; and the proceedings thereupon are to be as upon a feigned issue.

FELON DE SE. This means a felon of himself, a suicide, and denotes any one who deliberately puts an end to his own existence, or commits some unlawful or malicious act in committing which he occasions his own death; as, e.g., when unlawfully shooting at another person the gun bursts, and he kills himself.

See also title HOMICIDE.

FELONY. Any capital crime short of treason, and being such as occasioned at

FELONY—*continued.*

Common Law the forfeiture of the felon's lands and goods, or at any rate of his goods. The word "felony" in its generic sense includes even treason, and under particular statutes, e.g., 39 & 40 Geo. 3, c. 93, the offence of treason may be prosecuted as a felony. The crime of felony stands midway between treason and misdemeanors. See both these titles.

FEME COVERT. A married woman is so called, but whether from the legal or from the physical meaning of the word *cover*, or from both, is uncertain.

See title MARRIED WOMAN.

FEME SOLE. An unmarried woman is so called; also, any woman who, although married, is in matters of property independent of her husband, is a *feme sole quoad* such property, and may deal with it in every respect as if she were unmarried. *Taylor v. Meads*, 34 L. J. (Ch.) 203.

FENCES: See title PARTY-WALLS.

FEOFFMENT: See title CONVEYANCES.

FERE NATURE. Animals so described are wild animals in which there is no property, but in respect of which, or of some of them, there may be an exclusive right of preserving and of killing, which is analogous to the right of property, and which is designated *Game*. See that title.

FERRY. Is properly a place of transit across a river, or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another; it is not a servitude or easement; it is wholly unconnected with the ownership or occupation of land, so much so, that the owner of the ferry need not have any property in the soil adjacent on either side (*Newton v. Cubitt*, 12 C. B. (N.S.) 32). The owner of the ferry is bound to maintain it in a proper state of repair.

A ferry may have originated in legal grant; but from a user of thirty-five years, a jury will presume that the ferry had a legal origin (*Trotter v. Harris*, 2 Y. & J. 285); and in case of a disturbance of the franchise, it is sufficient for the plaintiff to shew that he was in possession at the time of the disturbance. *Trotter v. Harris*, *supra*.

FEUD. This was a *fee* (see that title). Feuds were either *proper* or *improper*, the former class being purely military, given *freely*, i.e., *gratis*, to persons duly qualified to discharge military services, the latter

FEUD—continued.

class being either given in exchange for some equivalent in money or in kind, or granted free from all manner of services, or granted in return for certain determinate services of a non-military nature.

See also title **FEDERAL SYSTEM**.

FEUDAL. This is the adjective from *feud*, e.g., the feudal law signifies the doctrine of *feuds*. *Feudal possession* is the same thing as *seisin*; and *feudal actions* is the old name for *real actions*. Thus a tenant for years had not the feudal possession, and consequently had no real action, for a man's remedies are necessarily only commensurate in extent and in quality with his rights.

See title **SEISIN**.

FEUDAL SYSTEM. Previously to the Norman Conquest, feudalism, strictly so called, was unknown in England, although something superficially analogous to it existed in Anglo-Saxon times. It was introduced into England partially in 1066 as a consequence of the acquisition or conquest of England by William I. in that year; and the system was completely established in England in 1085 by Law 52 of that sovereign, founded on the oath taken at Salisbury in the latter year by all free men. The law is in these words: "*Statuimus ut omnes liberi homines fœdere et sacramento affirmant quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo et contra inimicos et alienigenas defendere.*" The precise nature of the change in the law of land which was thus effected at a stroke was the entire destruction of *ownerships* and the substitution for them of *tenures*; henceforward there was no such thing as absolute ownership in land, but only a *tenure* of them; whence also lands have ever since been, as they now also are, described as *tenements*.

Almost all the real property of the kingdom is by the policy of the law considered to be holden of some superior lord in consideration of certain services. The thing holden is therefore styled a *tenement*, the holder thereof a *tenant*, and the manner of his holding a *tenure*. Thus, all the land of the kingdom is supposed to be holden mediately or immediately of the king, as lord paramount. Those that held immediately under him in right of his crown and dignity were called his tenants *in capite*; those that held mediately under him were called *mesne tenants*, or tenants holding of *mesne lords*.

Feuds are the same thing as tenancies. The services in consideration of which feuds were held were originally purely military,

FEUDAL SYSTEM—continued.

that being the policy of the Northern (as, indeed, also of other) conquering nations, devised as the most likely means to secure their new acquisitions. And the princes of Europe being every day more and more alarmed by the progress of those Northern conquerors, many of them (and by degrees all) adopted the like policy in self-defence, parcelling out the lands of their kingdoms among their officers whom they swore to fidelity, and reserving to themselves only the *nudum dominium* or bare absolute ownership of the lands. Still, at the period referred to, the far larger part of the land remained *allodial*; and the further extension of the feudal system is attributable to the forlorn state in which the allodial proprietor found himself during the period of anarchy and private warfare which succeeded the death of Charlemagne, and to the expediency which he therefore felt of a voluntary subjection of himself to the feudal relation.

In England, in particular, the system was introduced and made universal by the enlightened dexterity and energy of William I., who is thence called the Conqueror, or Acquirer, i.e., purchaser of the absolute ownership of all the lands in England, he having by the oath of Salisbury, in 1087, bound not only his own tenants *in capite*, but all other tenants also, in fealty or fidelity to himself as sovereign.

Feuds were originally precarious, and not hereditary; but it was unusual, and would have been thought hard and undeserved, either to determine the tenancy during the life of the feudatory, or to reject the heir of the former feudatory, if otherwise able and unobjectionable. Upon the heir taking up the inheritance by permission of the sovereign, he paid a relief (*relevatum*, or taking-up fine), an incident of the feud which has survived to the present day, although feuds are now no longer precarious, but hereditary. Feuds were afterwards extended beyond the life of the first tenant to the sons of the first tenant, and (but only if the feud was *antiquum*, i.e., had been long in the family) to the grandchildren, and even to the collateral relations of the first tenant. It is an opinion of Spelman's that so long as the tenancy was precarious, it was called simply a *munus*, that when it became certain for life, it was called a *beneficium*, and that only when it became inheritable it was called a *feudum*.

Feuds were either proper or improper feuds. (1.) A proper feud was one which was purely military; whence women and monks were at first incapable of succeeding to this species of feud; whence also it

FEUDAL SYSTEM—continued.

could not be aliened without the consent of the lord, and in like manner the lord could not alien his seigniority without the consent of the tenant, the obligations of the superior and inferior being mutual and reciprocal. Proper feuds originally belonged to all the sons equally; but by a constitution of the Emperor Frederick they became indivisible, and descended to the eldest son alone (*see* PRIMOGENITURE). (2.) An improper feud, on the other hand, was not necessarily military at all, much less was it purely military, but was in general granted in consideration of a rent, or *cense*, in lieu of military or other service, whence women were not excluded from it, and it was freely alienable.

The principal obligations incident to the feud were the following:—

- (1.) Wardship (*see* that title), although it is certain that this incident could form no part of the law of feuds before these became hereditary;
- (2.) Marriage (*see* that title);
- (3.) Relief (*see* that title);
- (4.) Aids (*see* that title);
- (5.) Escheat (*see* that title); and
- (6.) Escuage (*see* that title).

It is so absolute a maxim of the feudal law, or law of tenures, that all lands are holden mediately or immediately of the king, that even the king himself cannot give lands in so absolute and unconditional a manner as to set them free from tenure; and, therefore, in the case of such a gift, the donee would, prior to the 12 Car. 2, c. 24, have held the lands of the king *in capite* by knight service, and would since that statute now hold by fealty. All lands therefore being tenures, the varieties of tenures are the following, stating the same in the words of Bracton (Henry III.):—

“Tenements are of two kinds, (I.) Franktenement, and (II.) Villenage. And of Franktenements, (I. a.) some are held freely in consideration of homage and knight-service; (I. b.) others in free socage with the service of fealty only. Of villenages (II. a.) some are pure, and (II. b.) others are privileged, he that holds in pure villenage being bound to uncertain services of a villain nature, and he that holds in privileged villenage being bound to certain services of a villain nature, whence also the latter is often called a villainsman.”

For a description of each of these four varieties, see the following respective titles,—

TENURE BY KNIGHT-SERVICE;**TENURE IN SOCAGE;**

(a.) Fee simple;

(b.) Fee tail;

FEUDAL SYSTEM—continued.

- (c.) Estate for life;
- (d.) Estate in dower;
- (e.) Curtesy estate;
- (f.) Burgage tenure; and
- (g.) Gavelkind;

COPYHOLDS; and
CUSTOMARY FREE- } and generally,
HOLDS, } VILLENAGE.

FEUDATORY. This was a name for a feudal tenant, or vassal. The word is to be distinguished from *feudary*, which denoted an officer in the Court of Wards, who was appointed by the 32 Hen. 8, c. 46, and abolished by the 12 Car. 2, c. 24, and who, during the continuance of his office, acted as a receiver for the king of the lands of the king's *wards* and *widows*.

FIAT. This is a Latin word signifying “*let it be done*.” Thus, upon a petition to the King for his warrant to bring a writ of error to the House of Lords, he used to write the words *fiat justitia*, “let justice be done,” on the top of the petition. And in like manner, it was under a fiat of the Lord Chancellor, addressed to the Court of Bankruptcy, that the petitioning creditor used to prosecute, and that that Court used to hear the bankruptcy petition. Both these uses of the word “fiat” have gone into disuse, but analogous uses of the word remain; and as so used, the word in every case denotes an authority issuing from some competent source for the doing of some legal act.

FICTIONS. These are assumptions of an innocent and even beneficial character, made for the advancement of the ends of justice. They secure this end chiefly by the extension of procedure from cases to which it is applicable, to other cases to which it is not strictly applicable, the ground of the inapplicability being some difference of an immaterial character. Thus, by the strict law of Rome, a foreigner (*peregrinus*) who had committed or suffered a tort, was neither liable to be sued, nor competent to sue, for the same; but at a very early period the *peregrinus* in such a case was enabled to sue, and was made liable to be sued, upon the assumption, *i.e.*, fiction, that he was a Roman citizen. And similarly in English Law, the procedure of the Court of Exchequer, which was strictly confined to matters affecting the Crown revenues, was extended by means of the fiction *quo minus* to general civil suits in debt, and similarly the procedure of the Court of Queen's Bench was extended by the fiction of the *ac etiam* clause. It was customary also at one time to lay the

FICTIONS—continued.

venue at St. Martin's-le-Grand by a fiction for the true venue in the case of murders committed abroad, e.g., in Jamaica, this being an innocent fiction, the utility of which consisted in giving the Queen's Bench in England jurisdiction to try the offence. And generally, the procedure of Courts of Equity, so far as the same is supplementary to that of Courts of Common Law, depended largely on fictions of the like sort, e.g., that the *cestui que trust* was feudally possessed, and might sue in the absence of his trustee, in whom the legal estate in reality was.

According to Maine, fictions stand midway between early law and modern legislation, as a means of advancing the law. This opinion is corroborated by what actually occurred in the Roman Law, and by what is daily occurring in English Law. Thus, the *actio Rutiliana*, which was the result of legislation, superseded the *actio Serviana*, which was the product of a fiction (Gai. iv. 35); and in English law, by the C. L. P. Act, 1852, the *cestui que trust* was empowered to proceed at Law precisely as he might have done in Equity, a provision which is now made general by the Judicature Act, 1873.

FIDEICOMMISSARIUS. This word denoted in Roman Law the person who in English Law is called the *cestui que trust*. The *prætor fideicommissarius* was an officer who corresponded to the Lord Chancellor. *Fideicommissa* was the name for *trusts*, which are said to have been introduced for the first time in the reign of Augustus (Just. 2, 23, 1) in the person of Lucius Lentulus.

FIDEJUSSOR. Is a surety in Roman Law. He might be added to any obligation, whether civil or natural, being in this respect (and in a few other respects) different from both a *fidepromissor* and a *sponsor*, who were also sureties. He enjoyed a right against the principal debtor analogous to the right of recoupment in English law, and which was called the *actio depensi*; but after the *Epistula Hadriani* (117 A.D.), he had no right analogous to the English law right of contribution as between co-sureties, but he had a better right, viz., the *beneficium divisionis*, which required the creditor to split his demand evenly among all the co-sureties, whom for that purpose he made co-defendants.

See also title **SURETY**.

FIDUCIARY. This phrase is derived from the Latin *fiduciarius*, which in Roman Law denoted substantially a trustee; and, accordingly, the word is used in English Law to denote any one who holds the

FIDUCIARY—continued.

character of trustee, or (more accurately) a character analogous to that of trustee: e.g., agents, guardians, and the like.

In the Roman Law, a *fiduciarius tutor* was the elder brother of an emancipated *pupillus*, whose father had died leaving him still under fourteen years of age.

FI. FA. Is a writ of execution, as to the general character of which, see that title. The particular writ is in substance a command to the party to whom it is directed, viz., the sheriff, that of the goods and chattels of the debtor he do cause to be made (*feri facias*) the sum recovered by the judgment, together with interest at 4 per cent., and that he have the money and interest, and the writ itself, before the Court immediately after the execution of the writ, or on a day certain in term, to be rendered to the party who sued out the writ. Under the stat. 1 & 2 Vict. c. 110, the sheriff may, upon a *fi. fa.*, seize any money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the debtor, in addition to things that were already seizable by the Common Law; but by stat. 8 & 9 Vict. c. 127, the wearing apparel and bedding of the debtor or his family, and the tools and implements of his trade, to the extent of £5 in value, are protected.

FIFTEENTHS. This was a tax consisting of one-fifteenth part of all the moveable property of the subject. It is said to have been first imposed by Hen. 2. See title **TAXATION**.

FILING OF RECORD. This means entering amongst the records of the Court.

FINAL JUDGMENT. A judgment is either final or interlocutory. It is said to be *final* when it is complete in itself, and entitles the party to obtain at once the fruits of his judgment, without any further inquiry being requisite for the purpose of ascertaining its amount. On the other hand, a judgment is said to be *interlocutory*, when something further remains to be done in the suit before the successful party is entitled to issue execution upon his judgment. For example, in an action of assumpsit, if the defendant suffers judgment to go by default, the judgment is interlocutory only, because the amount of the debt or damages has first to be ascertained, and possibly a jury to be summoned for the purpose, before any execution may issue on the judgment. But under the C. L. P. Act, 1852, many judgments which used to be held interlocutory are made final, subject to the ascertainment of the amount of debt or damages, where that is a mere matter of calculation.

FINAL PROCESS. As distinguished from *meane process* (for which, see that title), this phrase is used to denote writs of execution, such as *fi. fa.* and *elegit*, being the steps taken at the end of a successful action for the purpose of realizing the fruits of a judgment.

FINDING OF A JURY. This denotes the verdict of the jury. They find a mixed verdict, that is, partly of law and partly of fact; and it is competent for them to find the contrary of the truth, for their finding maketh even what is false to be true, in cases of an exceptional character: see *Bushell's Case*, 6 St. Tr. 909.

FINE. A species of assurance abolished by the stat. 3 & 4 Will. 4, c. 74, but which previously to that statute was commonly in use for assuring estates of freehold. It was an amicable agreement (*finis concordie*) of a suit, whether real or fictitious, although most commonly the latter, between the demandant and tenant, with the consent of the judges, and inrolled among the records of the Court. The principal uses of the fine were two, viz.: (1.) To bar estates-tail, and (2.) To pass the interests of married women in real property. It acquired the power of effecting the first of these two purposes by the Statute of Fines (11 Hen. 7, c. 1), as judicially construed in the reign of Henry VIII., and which construction was afterwards confirmed by the stat. 32 Hen. 8, c. 36, which also made the bar immediate. The effect of it was, however, confined to barring the issue only of the tenant. Its modern substitute and equivalent is a disentailing deed, executed by the tenant in tail and inrolled, but in which the protector of the settlement has refused to concur. With reference to the second purpose, it seems to have always had that power even by the Common Law, the necessity of obtaining the consent of the judges affording a sufficient guarantee for the protection of the rights of the lady. Its modern substitute is a deed acknowledged, the acknowledgment before the Court, or a duly authorized commissioner, affording the like guarantee.

FINES ON ALIENATION. These were incidents of the tenure by knight service *in capite*, and became payable to the king upon any alienation by his tenant, apparently as the purchase-money for liberty to aliene. In case such a tenant attempted to aliene without having first obtained in that manner the king's licence so to do, he incurred a complete forfeiture of his lands. Similar fines were also exacted, and still are exacted, upon the alienation of lands of copyhold tenure.

See title COPYHOLDS.

FIRE. The law as to fire-brigades and firemen within the metropolis is regulated by the Act 28 & 29 Vict. c. 90; and the general law as to fireworks (their manufacture, sale, and use) is contained in the Act 23 & 24 Vict. c. 139. Under the stat. 14 Geo. 3, c. 78, a person on whose premises a fire accidentally arises is not liable to any action for the injury thereby occasioned to others, any law, usage, or custom to the contrary notwithstanding.

FIRE-NOTE. This is the same as *house-bote*, which title see; and see also title ESTOVERS.

FIRST FRUITS (*primitiæ*.) The first year's whole profits of a benefice or spiritual living. These were originally part of the papal usurpations over the clergy of this kingdom; and as they expressed their willingness to contribute so much of their income to the head of the church, it was thought proper, when the papal power was abolished, and the king declared head of the Church of England, to annex this revenue to the Crown, which was done by stat. 26 Hen. 8, c. 3 (confirmed by stat. 1 Eliz. c. 4), and a new *valor beneficiorum* was then made, by which the clergy have since been rated.

FISHERY. The right or privilege of fishing. It is a species of common, and is sometimes described as *common of piscary*. *Free fishery* is the exclusive right of fishing in a public river, and is a privilege of the Crown. *Several fishery* is a right of fishing enjoyed by the owner of the soil of the river, and which he may lease or devolve in any other manner upon a stranger.

FISH ROYAL. These were the whale and the sturgeon, which, when thrown ashore, or caught near the coast, became the property of the king by virtue of his prerogative, and in recompence for his protecting the shore from pirates and robbers.

FIXTURES. As the name denotes, are things fixed or affixed to other things. The rule of law regarding them is that which is expressed in the maxim *Accessio cedit principali*, "the accessory goes with, and as part of, the principal subject-matter." This maxim, as applied to lands, has assumed in English Law the form "*Quidquid plantatur solo, solo cedit*," and in Roman Law the form "*Omne quod inedicatur solo, solo cedit*." The rule had its first application in English Law in the case of buildings erected on land for agricultural purposes, whence agricultural fixtures so called present the operation of the maxim in its most general form. But inasmuch as that maxim was thought to operate, and undoubtedly did operate, in discourage-

FIXTURES—continued.

ment of trade, there grew up a mitigation of the rule, applicable to trade fixtures as they were called, and which mitigation was to this effect, that fixtures of the latter sort might be removed during the tenancy by the tenant who had put them in, but not after the determination of his tenancy. This mitigation of the rule was subsequently extended, upon the like grounds of utility, to ornamental fixtures so called, which also were permitted to be removed during the tenancy, but not afterwards.

Fixtures are chattels of an amphibious character, being for some purposes and at some times interests in land and for other purposes, and at other times purely personal chattels. Thus, while fixtures are annexed to lands or houses, they are an interest in land, and are rateable as land, and trover will not lie for their conversion or detention; and yet even while so annexed, they are not, *semble*, an interest in land within the meaning of the 4th sect. of the Statute of Frauds (29 Car. 2, c. 3). On the other hand, fixtures, even while annexed, are purely personal chattels within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36); and yet the Courts have held that where they are comprised in one testatum, together with the lands or houses to which they are attached, they are to be treated as part and parcel of the lands or houses, and that the Bills of Sale Act, 1854, intended them to be personal chattels only when treated in a separate testatum by themselves, and when the grantee or mortgagee had the power of removal and of sale: See *Hawtrej v. Butlin*, 21 W. R. 633, and *Ex parte Barclay, Re Joyce*, 22 W. R. 608-610 (reflecting on *Allen v. Meux, l.c.*); and see generally Brown on Law of Fixtures, 2nd ed. 1872.

FLOTSAM: See title JETSAM.

FENUS NAUTICUM. This phrase literally means maritime interest, which was commonly at a higher rate of percentage than ordinary interest, in consideration of the extra risks which are incurred at sea.

See also titles BOTTOMRY; RESPON-
DENTIA.

FOLK-LAND. In Anglo-Saxon times, lands were divided into boc-land and folc-land, the former being held by writing, and the latter by custom merely.

FOLK-MOTE. This denotes an assembly of the people. It was in the nature of an inferior Court, and an appeal lay from it to the superior Courts. It is supposed to have been the same as the shire-gemote in counties, and as the burg-gemote in

FOLK-MOTE—continued.

burghs. But it had other more general meanings, and denoted merely a popular assembly; summoned for any cause, whether permanent or occasional, and either to complain of existing misgovernment or to renew the duty of allegiance to the sovereign. In these latter senses, it seems to have acted as that ultimate tribunal of the Commons themselves, to which (in the words of Austin) the House of Commons and the ministers are subject.

FORCIBLE ENTRY. This is a criminal offence, and consists of an entry or detainer made with such a number of persons or with such a shew of force as is calculated to deter the rightful owner from sending the persons away and resuming his own possession (*Milner v. Maclean*, 2 C. & P. 17). The offence is something more than a trespass (*Rex v. Smyth*, 5 C. & P. 201). The entry must have been unlawful, to come within the stat. 8 Hen. 6, c. 9.

FORECLOSURE. This is one of the remedies of a mortgagee. For its operation and effect see title MORTGAGE.

FOREIGN ATTACHMENT. When the defendant is sued in the Lord Mayor's Court of the City of London, it is the custom of that City and Court to issue an attachment against moneys or debts in which the defendant has a beneficial interest, and for which that defendant might at the time of the attachment have brought an action (*Webster v. Webster*, 31 Beav. 398). It is not necessary that the debt for which the attachment issues should arise within the jurisdiction, or that the parties should be within the jurisdiction, but only that the debt attached should be so. A foreign attachment is no bar to an action for the same debt.

FOREIGN ENLISTMENT. The stat. 59 Geo. 3, c. 69, was until recently the Foreign Enlistment Act for England; but during the recent Franco-Prussian war that Act was repealed, and a further and more stringent Foreign Enlistment Act (33 & 34 Vict. c. 90) was passed, declaring illegal, and visiting with penalties, the following offences, viz.:—

- (1.) Enlisting in military or naval service of any foreign state at war with another foreign state at peace with England;
- (2.) Being in any manner subservient thereto or assisting therein; and
- (3.) Building ships or making expeditions in aid of either belligerent.

FOREIGN LAWS. Are often the suggesting occasions of changes in, or additions to, our own laws, and in that respect

FOREIGN LAWS—continued.

are called *jus receptum*. But foreign laws sometimes prevail almost *proprio vigore* within this country, through our Courts of Justice choosing invariably to follow them in certain cases. What those cases are, and in what cases the English Courts refuse to follow the foreign law and apply the Law of England, may be learned from a study of the "Conflict of Laws," by Mr. Story or Mr. Wharton, or (more conveniently, perhaps) from Westlake's *Priv. Inter. Law*. And for some detailed information of the various laws which come in conflict, see these titles in this dictionary, viz., *LEX LOCI REI SITÆ*; *LEX DOMICILII*; *LEX LOCI ACTUS* or *CELEBRATIONIS*; *LEX LOCI SITUS*; *LEX LOCI SOLUTIONIS* or *CONTRACTUS*; and *LEX FORI*.

FORESTALLING. Called also re-grating or engrossing of the market, is an offence by the Common Law; thus, spreading rumours, with intent to enhance the price of hops, in the hearing of hop-planters, to the effect that the stock is nearly exhausted and that there will be a scarcity, is an instance of this offence. Some attempt was made by the stat. 7 & 8 Vict. c. 24, to regulate the offence, but apparently with poor effect; the statute was necessary, inasmuch as the Common Law offence extends only to the necessities of life (*Pettambersdars v. Nockoorseydas*, 7 Moo. P. C. C. 239). The Index to the Revised Edition of the Statutes, p. 407, speaks of the offence of forestalling, &c., as abolished by the last-mentioned statute, *sed quare*.

FOREST-LAW. This was a particular system or body of laws relating to the forests of the Crown. It is popularly associated with everything that was cruel,—an opinion to which the frequency of that kind of statute called *Carta de Foresta* seems to give some probability. The officers of the forest, who were charged to preserve the "vert and venison" thereof, were called *foresters*.

FORFEITURE. By the stat. 33 & 34 Vict. c. 23, forfeiture or escheat of lands on the ground of felony is abolished, but of course remains for any other cause (see title *ESCHEAT*). The law of forfeiture also still applies as between landlords and their tenants for breaches of covenants contained in leases; and with reference to these, not being mere informal insurances, neither Courts of Law nor Courts of Equity have much or any power to relieve. See title *PENALTIES*.

See also title *WAIVER*.

FORGERY. This is a criminal offence, existing partly by Common Law and partly by statute. Forgery at Common Law is

FORGERY—continued.

the fraudulent making or alteration of a writing to the prejudice of another man's right. Under the stat. 24 & 25 Vict. c. 98, and numerous other statutes, offences analogous to forgery at Common Law are made felonies, and are punishable as forgeries; but that punishment is not now death (as formerly), but penal servitude for life, or for any term not less than five years, or imprisonment, with or without hard labour, and with or without solitary confinement, for any term not exceeding two years.

FORISFAMILIATED. An antiquated word, which signifies much the same as set up in the world (see title *ADVANCEMENT*). A son was said to be forisfamiliarated when in his father's lifetime he received his part of the lands, and was contained therewith.

See also title *HOTCHPOT*.

FORMA PAUPERIS. A person is said to sue or defend an action or suit in *forma pauperis*, i.e., in the character of a poor person, when, by going through certain forms, he is admitted by the Court so to sue or defend, and has counsel and attorneys assigned to conduct his case free of charge. An order of the Court is necessary, which is to be obtained upon a petition of the party, accompanied with a certificate of counsel. The order must be served on the opposite party, and only takes effect as from the date of such service (*Fray v. Voules*, L. R. 3 Q. B. 214); but, subject to that rule, the party may be admitted to sue or defend in this capacity at any stage of the proceedings. Moreover, he may appeal without making any deposit. *Drennan v. Andrew*, L. R. 1 Ch. 300.

FORMEDON. This was an action in the nature of a writ of right. There were three species of the writ, viz. :—

- (1.) *Formedon in the descender*;
- (2.) *Formedon in the remainder*; and
- (3.) *Formedon in the reversion*;

these forms of writ being applicable respectively in the following cases :—

(1.) *Formedon in the descender*, where the tenant in tail aliened the land entailed or was disseised thereof and died, and the heir in tail wanted to recover the land against the then tenant of the freehold;

(2.) *Formedon in the remainder*, where the tenant for life or in tail with remainder to a third person in fee or in tail died (and, in the case of tenant in tail, without issue), and afterwards a stranger intruded upon the land and kept the remainderman out of possession, and the remainderman wanted to recover the land from the intruder; and

(3.) *Formedon in the reverter*, where the tenant in tail died without issue, and the

FOREMEDON—continued.

reversioner wanted to recover the lands against the then tenant thereof.

All these forms of this writ were abolished by the stat. 3 & 4 Will 4, c. 27. s. 36, but it would be a mistake to suppose that the analogous remedies are abolished, which they are not.

FRANCHISE. For the electoral franchise, see that title. But a franchise, as otherwise used, is an incorporeal hereditament or right, such as a ferry, or a market, entitling the owner of the franchise to take certain tolls or pecuniary payments. Sometimes, also, it denotes an exemption from the ordinary jurisdiction, coupled with the right of exercising a jurisdiction of one's own; and in this last signification it is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject; e.g., to be a county palatine, to have right to hold a Court leet, to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands. 3 Cru. 278.

FRANKALMOIGN. Is a species of tenure of lands granted by the owner to the church or to any monastic body, to hold to the church or monastery for ever free (as the name denotes) of all manner of services to the donor for ever, save and except the saying of prayers and the distributing of charity to the poor for the welfare of the soul of the donor and his family for ever.

FRANKMARRIAGE. Is a species of tenure of lands granted by the owner to his son-in-law upon his marrying into the family, to hold to such son-in-law and the heirs of the marriage free (as the name denotes) of all manner of services to the donor until the fourth generation, the sole consideration for the gift being the marriage itself.

FRAUD. Its definition and the varieties thereof:—

At Law, fraud has been thus variously defined:—

(1.) Falsely and fraudulently warranting a specific article sold (*Langridge v. Levy*, 2 M. & W. 519); the *scienter* is an essential part of the definition, and its absence dispels the fraud (*Longmeid v. Holliday*, 6 Ex. 761);

(2.) Falsely and fraudulently representing a man as a safe customer (*Pasley v. Freeman*, 3 T. R. 51), where the representation is intended to be acted upon, and is in writing under 9 Geo. 4, c. 14, s. 6;

(3.) Recklessly asserting, without any knowledge of the matter, the existence of a certain state of circumstances, and inducing the plaintiff, in reliance thereon, to act upon an erroneous assumption to his

FRAUD—continued.

loss (*Evans v. Edmunds*, 13 C. B. 777) [*sed quæritur*]; and

(4.) Asserting without any knowledge of the matter, but with a disbelieve of his own assertion, the existence of a certain state of circumstances, and inducing the plaintiff in reliance thereon to act upon an erroneous assumption, to his loss. *Taylor v. Ashton*, 11 M. & W. 415.

See *infra*, cases in which an action for fraud will lie at Law.

In Equity, fraud has never been defined, the Courts fearing that new cases of fraud might arise, which if they should not fall within the definition might prove to be irremediable; but the Courts of Equity have distinguished many classes and varieties of frauds, namely, the following:—

I. Actual Fraud, and hereunder two sub-varieties, namely:—

(A.) Frauds from a regard to the peculiar position of the defrauded person,

(B.) Frauds without any such regard, but arising from conduct generally, as being either

(1.) *Suggestio falsi*; or,

(2.) *Suppressio veri*.

II. Constructive Fraud, and hereunder three sub-varieties, namely:—

(A.) Frauds, because evasions of the rules of public policy,

(B.) Frauds, because violations of trust or of confidence reposed,

(C.) Frauds, because of unconscientious nature of acts themselves, either

(1.) As against the parties; or,

(2.) As against third persons.

And see concrete instances of fraud in paragraph containing Remedies in Equity.

Remedies in cases of *Fraud*. These remedies lie either at Law or in Equity.

I. The remedies available at Law are the following:—

(1.) An action on the case in the nature of a writ of deceit, and recovering damages for the fraud; and

(2.) An action on the common indebitatus count for money had and received, and recovering the full amount of the debt.

Generally speaking, the first of these two remedies, viz., an action to recover damages arising from fraud, will lie in every case of fraud; but if the plaintiff chooses to disaffirm the contract on the ground of fraud, he may then bring the second form of action, viz., an action on the common indebitatus count (*Neate v. Harding*, 6 Ex. 349). But some act of disaffirmance must in every case precede the commencement of the latter form of action. *Smith v. Hod-*

FRAUD—*cont'ued.*

son. 4 T. R. 211; 2 Sm. L. C. 119, and notes.

A false warranty and a misrepresentation being often difficult to distinguish, it is customary in practice to join a count for fraud with the count for a breach of warranty where it is doubtful whether a warranty can be proved.

There is, however, a limit to the right of bringing the first action, *i.e.*, an action on the case in the nature of deceit, it being a rule of the Common Law that such an action will not lie against a principal for the fraudulent representations of his agent, the principal not having either expressly or impliedly authorized the agent to make the representations (*Cornfoot v. Fowke*, 6 M. & W. 358); and therefore an incorporated company cannot as such be made liable in this action for the false representations of its directors, the company not having authorized the directors to make the representations (*Western Bank of Scotland v. Addie*, L. R. 1 S. & D. 162), the remedy (if any) being against the directors only. *Gerhard v. Bates*, 2 El. & Bl. 487.

And there is also a limit to the right of bringing the second action, *i.e.*, an action for money had and received, it being a rule of the Common Law that such an action will not lie if the circumstances have so far changed since the date of the contract that the parties cannot be restored to the position in which they stood before or at the time of the contract (*Clarke v. Dickson*, El. Bl. & El. 148); and therefore a contract, although induced by fraud, cannot be avoided if the rights of an innocent vendee have in the meantime intervened. *Queen v. Saddler's Company*, 10 H. L. C. 420.

At Law, an action to recover damages arising from fraud, or (upon a disaffirmance) an action on the common indebitatus count, will lie in the following cases:—

(1.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, *knowing it to be untrue*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Pasley v. Freeman*, 3 T. R. 51);

(2.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, without knowing whether it is false or true, *but not believing it to be true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Taylor v. Ashton*, 11 M. & W. 401);

(3.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, knowing

FRAUD—*continued.*

it to be untrue, *but from defect of memory believing at the time that it is true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Slim v. Croucher*, 2 Giff. 37);

(4.) Where, *semble*, the defendant has stated or represented as a matter of opinion merely what is untrue, *not believing it to be true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss;

(5.) Where the defendant has fraudulently concealed from the plaintiff some defect which it was his duty (either generally, or by reason of the special circumstances of the transaction) to disclose, with intent to induce the plaintiff to act upon the assumption of the absence of such defect, and has thereby induced the plaintiff to act upon that assumption, to his loss (*Horsfall v. Thomas*, 1 H. & C. 90); and

(6.) Where the defendant has falsely and fraudulently warranted a specific article sold (*Langridge v. Levy*, 2 M. & W. 519); in which latter case (waiving the fraud) an action would lie for breach of warranty.

But such action will not lie at Law in the following cases:—

(1.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, knowing it to be untrue, *but without intent to induce the plaintiff to act upon it*, although the plaintiff may have been induced thereby to act upon it, to his loss (*Way v. Hearn*, 13 C. B. (N.S.) 292);

(2.) Where the defendant has stated or represented as a matter of fact (and not of opinion merely) what is untrue, without knowing whether it is false or true, *but believing it to be true, and not being under any duty to know the contrary*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss (*Evans v. Collins*, 5 Q. B. 804; see also title **FRAUD, LEGAL WITHOUT MORAL FRAUD**);

(3.) Where the defendant has stated or represented as matter of opinion merely what is untrue, *believing it to be true*, with intent to induce the plaintiff to act upon it, and has thereby induced the plaintiff to act upon it, to his loss. This is an application of the maxim, *Caveat Emptor*; and

(4.) Where the defendant has fraudulently concealed from the plaintiff some defect, which it was not the duty of the defendant (either generally, or by reason of the special circumstances of the transaction) to disclose, but on the contrary the duty of the plaintiff to discover, with

FRAUD—continued.

intent to induce the plaintiff to act upon the assumption of the absence of such defect, and has thereby induced the plaintiff to act upon that assumption, to his loss. This is another application of the maxim *Caveat Emptor*.

As to *pleading fraud at Law*, the defence must be specially pleaded, although it is generally sufficient for the defendant to allege that he was induced to make the alleged contract by the fraud of the plaintiff. Where fraud is pleaded with particularity, no other fraud can be proved than that which is averred (*Tuck v. Tooke*, 9 B. & C. 437). Sometimes the Court orders particulars of the fraud to be delivered. *Marshall v. Emperor Life Assurance Society*, L. R. 1 Q. B. 35.

II. The remedies available in Equity are the following:—

- (1.) The Rescission of the Contract, and hereunder,—
 - (a.) The cancellation and delivery up of executory agreements;
 - (b.) The setting aside of executed agreements;
- (2.) The specific performance of the contract with or without compensation;
- (3.) An injunction from profiting by the fraud; and
- (4.) A declaration making the defrauding party a trustee for the party defrauded.

Every such remedy is available by bill, and by bill only. The bill must not rest upon a mere general allegation of fraud, but must state in a particular manner the details of the transaction which is impugned as fraudulent, in order that the Court may infer from that statement whether there was or not any fraud in the transaction. *Gilbert v. Lewis*, 1 De G. J. & S. 38.

(A.) Where the remedy sought is the RESCISSION OF THE CONTRACT, whether that be for the cancellation and delivery up of executory or for the setting aside of executed agreements, the following are the general requisites to the success of the suit:—

(1.) That the party against whom relief is sought can be remitted to his former position, the interests of third parties without notice of the fraud not having meanwhile intervened;

(2.) That the contract may be rescinded *in toto*, unless indeed it be severable in its nature, in which latter case the rescission of the fraudulent portion of it may, subject to the first requisite, be obtained (*Maturin v. Tradennick*, 12 W. R. 740); and

(3.) That the party to the contract is either himself the person who committed the fraud or is a privy of such person. *Puleford v. Richards*, 17 Beav. 95.

FRAUD—continued.

The remedy by rescission is available in the cases of the following general character, *e.g.*, where a brother or other person gives the intended wife a sum of money to swell her fortune, taking a bond for the repayment of the sum. *Gale v. Lindo*, 1 Vern. 475; and see the very similar case of *Turton v. Benson*, 1 P. Wms. 496.

The terms upon which a transaction is rescinded are in general upon the plaintiff doing equity. Thus, fraudulent instruments are commonly set aside on repayment by the plaintiff of the actual consideration given, with interest thereon at a reasonable rate; or they are directed to stand as a security for the moneys actually advanced with the like interest, or for what upon taking the accounts shall be ascertained to be really due. And where the transaction affects real estate, it is usual to direct a reconveyance thereof upon repayment of the purchase-moneys and all sums laid out in improvements and repairs of a permanent and substantial nature by which the present value is improved, with interest thereon from the respective times of the actual disbursements, the party in possession accounting on his part for deteriorations and for the rents received and profits made in the meantime out of the estate. But *cestuis que trust* in respect of the frauds of their trustees, and principals in respect of the frauds of their agents, stand upon more favourable terms, being entitled at their option to hold the defrauding person to his fraud if that is more beneficial to them, and at the same time to take the profits he has made by the fraud, or at their option to have the property re-conveyed, and interest paid at the rate of 5 per cent., instead of 4 per cent., which is the usual rate in other cases. In the case of two or more co-partners, where one of them has been induced by fraud to enter into the partnership, the terms of rescission are that his co-partner or co-partners repay him whatever he has paid, with interest thereon, and indemnify him against all liabilities incurred by him through having become and been a partner, he on his part accounting for what profits he has received out of the partnership. Where a man has been fraudulently induced to take shares in a company, he is entitled to recover his money and to have his name removed from the register, he accounting to the company for any dividends or other profits in the meantime received by him.

(B.) Where the remedy sought is the SPECIFIC PERFORMANCE OF THE CONTRACT with or without compensation, the following are the general requisites to the success of the suit:—

- (1.) That the actual subject-matter of

FRAUD—continued.

the contract is in substance that which it was misrepresented as being, and that the difference accordingly admits of compensation;

(2.) That the party who made the misrepresentation, being plaintiff, offers to give compensation for the variance, or being defendant, is discharged by the plaintiff from giving such compensation (see *Selon v. Slade*, 7 Ves. 265; 2 Wh. & Tud. L. C. 468; and *Townshend v. Stangroom*, 6 Ves. 328); and

(3.) That the plaintiff is himself innocent in respect of the fraud or misrepresentation.

This remedy is available in the following cases, and, either

(1.) Against one who is a party to the contract; or,

(2.) Against one who is not a party to the contract.

(1.) Against one who is a party to the contract:—

(a.) Where, although the property is incorrectly described, yet the inaccuracy was known to the defendant at the time, or he inspected the property before making the purchase and relied upon his own judgment (*Dyer v. Hargrave*, 10 Ves. 505);

(b.) Where the vendor invited further investigation on the part of the purchaser, and gave him every facility for the same;

(c.) Where the misrepresentations are matters of opinion merely;

(d.) Where the property is subject to incumbrances concealed from the purchaser, and the vendor can by paying off these make good his assertion that the property is unincumbered; and

(e.) Where the property is subject to some small rent not disclosed at the time of the contract, and the vendor may satisfy or provide for the same by some deduction from the purchase-money, or by some commutation payment.

(2.) Against one who is not a party to the contract:—

(a.) Where a person makes a false representation of the value of property which is agreed to be charged in favour of another person as security for a loan to some third person (*Ingram v. Thorpe*, 7 Hare, 67; also *Burrowes v. Lock*, 10 Ves. 470; *Cleland v. Leech*, 5 Ir. Ch. 478); and

(b.) Where the father of an intended wife promises to her intended husband to leave her a sum of

FRAUD—continued.

money by his will, and the marriage contract follows upon the faith of such promise. *Barkworth v. Young*, 4 Drew. 1; and see the very similar case of *Hutton v. Rossiter*, 7 De G. M. & G. 9 (executor).

It follows that specific performance is excluded in all cases not presenting the three general requisites enumerated above, and more especially where the property is substantially different to what it was represented as being, e.g., if it is freehold instead of copyhold, or leasehold instead of freehold, and *vice versa*, or if it is an underlease and not an original lease, or *vice versa*, and so forth.

(C.) When an INJUNCTION is the remedy sought, that remedy is in general available in the following cases:—

(1.) Where a creditor of the intended husband represents to the father or other relation *in loco parentis* of the intended wife that the husband is not indebted to him. *Neville v. Wilkinson*, 1 Bro. C. C. 543.

(2.) Where a brother or other person gives the intended wife a sum of money to swell her fortune, taking a bond for the repayment of the sum. *Gale v. Lindo*, 1 Vern. 475; *Turton v. Benson*, 1 P. Wms. 496.

(3.) Where proceedings are taken at law upon an instrument which is vitiated by fraud, although the defence of fraud may be good at law. *Fernyhough v. Leader*, 15 L. J. (Ch.) 458.

(4.) Where the defrauding party threatens to part with or transfer property which he has fraudulently obtained, e.g., by paying over moneys, negotiating securities, and such like.

(5.) Where the fraud consists in the piracy of a trade-mark.

(6.) Where a right of prospect was the inducement upon which a person took a lease, and the lessor threatens to destroy the right by buildings opposite. *Piggott v. Stratton*, John. 359.

(7.) Where a retiring trader who has sold the goodwill of his business, upon the express or even implied understanding not to set up the same business next door, and he nevertheless proceeds to do so.

(D.) Where the remedy sought is a DECLARATION that the defrauding person is a TRUSTEE for the defrauded person, that remedy is available in the following cases:

(1.) In the case of moneys which have been fraudulently appropriated;

(2.) In the case of judgments or decrees fraudulently obtained.

It is clear that a Court of Equity cannot

FRAUD—continued.

set aside the judgment of a Court of Common Law; but it may decree the successful party who is successful through a fraud to reconvey or hold in trust for the party thereby defrauded any property or profit he may have acquired as the fruits of or under the judgment. *Barnesby v. Powell*, 1 Ves. 120, 285; *Allen v. Macpherson*, 1 Ph. 145; 1 H. L. C. 213.

In pleadings in Equity the fraud must be specifically alleged in the bill; and evidence is admissible to prove the case therein stated, and that case only. In case the fraud should not be proved, but a case for some relief be made, the bill may pray for such alternative relief. One bill may be brought against a single principal in respect of two totally distinct frauds committed by his two agents. *Walsham v. Stainton*, 1 De G. J. & S. 678.

In the case of the defence of purchase for value without notice of the fraud, that defence must be pleaded specially; but it is sufficient to deny the notice generally, unless particular facts are alleged as evidence of the notice, in which latter case, in addition to the plea, an answer denying the facts as specially and particularly as they are charged in the bill must accompany the plea (*Pennington v. Beechey*, 2 Sim & Stu. 282). And in every case of an answer being put in alone, the answer must be full, and it must also expressly set up the defence of purchase for value without notice, if that is a defence intended to be relied on.

Sometimes Law has jurisdiction in cases of fraud where Equity has none. Thus, (1.) Equity will not rescind a contract, where the parties to it cannot be restored to their respective original positions; and Law is, in that case, the only forum for redress (*Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 587). And again, (2.), where the party to the contract is neither the person who committed the fraud nor a privy of such person, the party defrauded can have no rescission of the contract in Equity; and unless therefore the misrepresentation may be made good, he must seek redress at Law against the person guilty of the fraud; whence, for the fraudulent representations of the directors of a company, not being representations authorized by the company, the redress is at Law (*Brockwell's Case*, 4 Drew. 205). Again, (3.), where a person has given a general representation of the character or credit of another, which is fraudulent, the person injured thereby, from his reliance thereon, can have no redress in Equity, but must proceed at Law in an action for damages. *Whitmore v. Mackeson*, 16 Beav. 128.

On the other hand, Equity has some-

FRAUD—continued.

times jurisdiction where Law has none. For, in general, Courts of Equity act upon much slighter evidence of fraud than Courts of Law do, inferring it, whereas at Law it must be proved, e.g., from the condition of the injured parties in the cases of fraud enumerated above. And in the great majority of cases, although there is a remedy at Law, yet the remedy in Equity is concurrent, and it is therefore optional for the plaintiff to sue in either jurisdiction, according as he finds the remedy either more convenient or more adequate; thus in *Colt v. Woollaston* (2 P. Wms., 154), a bill for the mere recovery of moneys was held not demurrable, and that case has been often followed since; and in *Barry v. Crosskey* (2 J. & H. 30), a bill in Equity was more convenient, as avoiding a multiplicity of actions.

FRAUD, LEGAL, APART FROM MORAL FRAUD.

The question has been raised whether legal fraud, unaccompanied by moral fraud, is actionable. This question only amounts to this, whether a false representation made without knowledge that it is false, and without any dishonest intention, should make the person (who has made it) liable in damages. The question is rendered more complex where the fraud occurs under the following circumstances: A. employs B. as his agent to sell a house. C. goes to the agent, intending to buy the house, and asks B. whether there is anything objectionable about the house or the neighbourhood. B. answers—no, and honestly believes there is nothing objectionable, but A., his principal, knows that the next house has a bad reputation. C. thereupon sues A. for the false representation of B., his agent:—Held, that A. was not liable, as he did not give B. any instructions to make the misrepresentation. *Cornfoot v. Fowke*, 6 M. & W. 358.

FRAUDS, STATUTE OF. This is the famous stat. 29 Car. 2, c. 3, which applies as well to Real Property as to Equity and to Common Law.

I. As applying to Real Property. It enacts that all leases, &c., of lands made without writing signed by the parties or their agents lawfully authorized in writing, shall have the force of leases, &c., at will only (s. 1); except, nevertheless, leases not exceeding three years from the making thereof which reserve two-third parts at the least of the full improved value of the lands demised (s. 2); and that no lease, &c., of lands (not being copyholds) shall be assigned, &c., or surrendered, unless it be by writing, signed by the party assigning,

FRAUDS, STATUTE OF—continued.

&c. or surrendering, or his agent lawfully authorized in writing, except, nevertheless assignments, &c., and surrenders by act and operation of law (s. 3).

II. As applying to Equity. It enacts that all declarations or creations of trusts of lands shall be in writing signed by the party declaring or creating the same (s. 7); except, nevertheless, trusts arising or resulting by the implication or construction of law, or transferred or distinguished by act or operation of law (s. 8); that all grants and assignments of trusts shall be in writing signed by the party granting or assigning the same (s. 9); and that the sheriff may take upon an execution for the debts of the *cestui que trust* all lands of which any one is seised or possessed in trust for him at the time of execution sued in like manner as the sheriff might or could have done if the *cestui que trust* had been himself seised thereof at that time; also, that such lands being fee simple lands descending to the heir of the *cestui que trust* shall be deemed assets by descent for payment of such debts, in like manner as they would have been if the estate had been legal (s. 10).

III. As applying to Common Law. It enacts that no action shall be brought,—

(1.) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or

(2.) Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or

(3.) Whereby to charge any person upon any agreement made upon consideration of marriage; or

(4.) Whereby to charge any person upon any contract or sale of lands or any interest in or concerning them; or

(5.) Whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof,—

Unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged therewith, or his agent lawfully authorized (s. 4);

And it further enacts, that no contract for the sale of any goods for the price of £10 or upwards shall be allowed to be good; unless

(1.) The buyer shall accept part of the goods so sold and actually receive the same; or

(2.) Give something in earnest to bind the bargain, or in part payment; or

(3.) Some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such con-

FRAUDS, STATUTE OF—continued.

tract or their agents lawfully authorized (s. 17);

And it further enacts that [judgments against lands shall bind the lands as against purchasers only from the day of signing judgment; and that] judgments against goods shall bind the property of the goods only from the day that the writ of execution thereon is delivered to the sheriff to be executed (ss. 14, 15).

FRAUDULENT GIFTS. Gifts, whether of lands or of personal estate, which are fraudulent, are so either (a.) By the Common Law; or (b.) By the Statute Law; and where they are fraudulent by Statute Law, they are so, either (aa.) Under the Statutes of Elizabeth against Fraud (13 Eliz. c. 5, and 27 Eliz. c. 4); or (bb.) Under the Bills of Sale Act, 1854, and the amending Acts; or (cc.) Under the Bankruptcy Act, 1869.

(A.) By the Common Law;—The criterion of fraud at the Common Law is not single but complex, its chief element being, however, the debtor's continuance in possession of the goods after the gift thereof. *Edwards v. Harben*, 2 T. R. 587.

(B.) Under the Statutes of Elizabeth:—By the Act 13 Eliz. c. 5, all gifts *inter vivos*, whether of lands or of goods, contrived of fraud to the end of delaying creditors and others of their lawful actions, suits, debts, or dues, are declared to be void, but only as against the creditor who is delayed thereby, his heirs, executors, administrators, and assigns; and by the Act 27 Eliz. c. 4, all gifts *inter vivos* of lands made of purpose to defraud or deceive subsequent purchasers thereof (s. 1), and all such gifts made revocable at the will of the maker thereof (s. 4), are declared to be void, but only as against the subsequent purchaser thereof, his heirs, executors, administrators, and assigns, and other persons lawfully claiming under him or them. And by s. 2, of the former Act and s. 2 of the latter Act, a penalty is inflicted upon the parties and privies to the fraud. *Poulton v. Wiseman*, Noy, 105.

In the construction of the two statutes it has been held that in raising a case of fraud to upset the gift, the fraud against creditors under the 13 Eliz. c. 5, must be proved to have existed and been complete at the date of the gift (*Stone v. Grubham*, 2 Bulst. 225), but that the fraud against purchasers under the 27 Eliz. c. 4, is only complete as from the date of the subsequent sale, from the mere fact of which having been afterwards made the fraud is conclusively inferred. *Townshend v. Windham*, 2 Ves. Sen. 1.

FRAUDULENT GIFTS—continued.

And in consequence of this distinction the following points have been established :

I. Under the 13 Eliz. c. 5 :—

(1.) There must at the date of the gift have been creditors in existence, or, in other words, the maker of the gift must at that time have been indebted, which means *embarrassed* (*Townsend v. Westacott*, 2 Beav. 340). If, therefore, the maker was not indebted at the date of the gift the gift is good (*Houghton v. Tate*, 3 Y. & J. 486); as it also is, even where he is indebted at that date, provided he be not also then embarrassed, but have ample (*Skarf v. Souby*, 1 Mac. & G. 364), or even less than ample (*Holmes v. Penny*, 3 K. & J. 90), means of then clearing off his indebtedness; but the maker's ignorance of his embarrassment will not make the gift a valid one (*Christy v. Courtenay*, 13 Beav. 96), the objective fraud and not the subjective innocence being the criterion looked at (*Spirett v. Willows*, 34 L. J. (Ch.) 365), in this country at the least, although the subjective innocence is regarded in America (*Hinde's Lessee v. Longworth*, 11 Wheaton, 199). Any contrivance to get rid of the creditors existing at the date of the gift, otherwise than by a *bona fide* payment of their debts, e.g., a contrivance to substitute fresh creditors in their places, paying the former with the moneys of the latter, will not succeed (*Richardson v. Smallwood*, Jac. 552); but the substituted creditors will be allowed to stand in the places of the former creditors for the purpose of defeating the gift (*Freeman v. Pope*, L. R. 9 Eq. 206); for generally when there is a fraudulent intent the proof of indebtedness at the date of the gift is not material (*Graham v. Funder*, 14 C. B. 410), and the word *others* in the statute following the word *creditors*, has been considered as referring to subsequent creditors as distinguished from creditors already in existence. *Taylor v. Jones*, 2 Atk. 600; and see also *Burling v. Bishop*, 29 Beav. 417.

(2.) The subjective innocence of the person to whom or in whose favour the fraudulent gift is made will not render it good (*Partridge v. Sopp*, 2 Amb. 596), but will save him from being placed in a worse position (*Tarleton v. Liddell*, 17 Q. B. 390) in consequence of the fraud: and if he or any person for him should have given value, the gift will be valid (*Copes v. Middleton*, 2 Madd. 410; *Holmes v. Penny*, 3 K. & J. 90), as it will also be in favour of a purchaser under him. *Doe v. Martyn*, 1 B. & P. 332.

(3.) The creditors intended by the statute are general creditors (*George v. Milbanke*, 9 Ves. 190), not mortgage creditors (*Stephens v. Olive*, 2 Bro. C. C. 90), unless

FRAUDULENT GIFTS—continued.

as to the unpaid surplus after realising their securities (*Harman v. Richards*, 10 Hare, 81), or unless, *semble*, as to the whole amount of the debt when they abandon their securities (*Lister v. Turner*, 5 Hare, 281). A voluntary creditor may sue (*Markwell v. Markwell*, 34 Beav. 12), provided he have a legal debt vested in him. *Sewell v. Moxey*, 2 Sim. (N. S.) 189, and Judicature Act, 1873.

II. Under the 27 Eliz. c. 4 :—

(1.) The statute extending only to lands, a fraudulent settlement of goods is not void under it (*Jones v. Croucher*, 1 S. & S. 315). All voluntary conveyances of lands are fraudulent under it, not as being voluntary merely, but as being conclusively fraudulent (*Doe v. Routledge*, 2 Cowp. 705; *Perry Herrick v. Attwood*, 2 De G. & J. 21). If the subsequent purchase is merely a contrivance to get rid of the voluntary deed, that makes no difference under the statute, as neither does *mala fides* in the subsequent purchasers (*Doe v. Manning*, 9 East, 59), at least in this country, although the rule is otherwise in America (2 N. York Rev. Stat. p. 134). A mortgagee is a purchaser within the meaning of the statute (*Rand v. Cartwright*, 1 Ch. Ca. 59), but a judgment-creditor is not (*Beavan v. Oxford* (Earl of), 6 De G. M. & G. 492). And it does not matter that the voluntary gift is to a charity being private (*Hinton v. Toye*, 1 Atk. 465), or, *semble*, being public. 43 Eliz. c. 4; *Trye v. Corporation of Gloucester*, 14 Beav. 173.

(2.) The purchase-money, *as such*, is not liable to be appropriated by the volunteers in specific recompense for the avoidance of the gift to them (*Daking v. Whimper*, 26 Beav. 568), but, as forming part of the general moneys belonging to the maker of the gift, it is liable to recompense them in certain ways (*Hales v. Cox*, 1 N. R. 344; *Dolphin v. Aylward*, L. R. 4 H. L. 486). Moreover, the voluntary deed is only void so far as the validity of the subsequent purchase or mortgage requires. *Rand v. Cartwright*, 1 Ch. Ca. 59.

(3.) The subsequent purchase which is to avoid the voluntary deed must be made from the vendor personally (*Richards v. Lewis*, 20 L. J. (C.P.) 177), not from his devisee (*Doe v. Rusham*, 17 Q. B. 724), nor from his heir-at-law. *Lewis v. Rees*, 3 K. & J. 132.

(C.) Under the Bills of Sale Act, 1854.—By the Act 17 & 18 Vict. c. 36, every bill of sale of personal chattels made on or after the 10th of July, 1854, whereby, whether the same be absolute or conditional, the grantee or holder thereof shall have power, either with notice or without notice, and either as from, or at any future time after, the execution of the bill of sale,

FRAUDULENT GIFTS—continued.

to seize or take possession of any property comprised in such bill, is as against all assignees in bankruptcy, general assignees, and execution creditors void to all intents and purposes to the extent of such part of the property therein comprised as consists of personal chattels being in the possession or apparent possession of the maker of the bill of sale at or after the date of the bankruptcy, general assignment, or execution (as the case may be), and after twenty-one days from such date, unless the following requisites have been complied with, namely,

(1.) The bill of sale (including the schedule thereto, if any), or a true copy thereof, is to be filed with the docket and judgments clerk in the Court of Queen's Bench within twenty-one days from the execution of the bill of sale;

(2.) An affidavit (a) of the time of making the bill of sale, (b) of the residence and occupation of the maker thereof, and (c) of the residence and occupation of the witnesses attesting the bill, is at the same time with filing the bill of sale (*Grindell v. Brendon*, 6 C. B. (N.S.) 698), and within twenty-one days from the execution thereof, to be filed in like manner as the bill of sale itself.

And by the interpretation clause a bill of sale means or includes assignments and all other assurances of personal chattels; also, licenses, or other authorities, to take possession of personal chattels, as security for a debt. Moreover, the phrase "personal chattels" means or includes goods, furniture, and fixtures, meaning tenants' fixtures.

By the Bills of Sale Act, 1866 (29 & 30 Vict. c. 96), amending the Bills of Sale Act, 1845, every such bill of sale as aforesaid must be re-registered every five years; such re-registration being made by the Master upon the applicant filing an affidavit in the Master's office in the form given in Schedule B of the Act of 1866.

Under these Acts a bill of sale which would be void in itself is not made valid by registration (*Re Daniel, Ex parte Ashby*, 25 L. T. 188). But assuming that the bill of sale is good in itself, then the assignee has twenty-one days during which he may neglect registration (*Banbury v. White*, 2 H. & C. 300); and if he takes possession during these twenty-one days he obtains a valid possession which dispenses with the necessity for registration altogether (*Marples v. Hartley*, 30 L. J. (Q.B.) 92). The twenty-one days are reckoned exclusively of the day of the execution of the bill of sale. *Williams v. Burgess*, 12 Ad. & E. 635.

If the first registration is informal and is invalid, the bill of sale may be taken off

FRAUDULENT GIFTS—continued.

the file and then put on again, and a proper registration of it made, provided the first twenty-one days have not elapsed. *In re Wright*, 27 L. T. 192.

An unregistered bill of sale, being good in itself, is of course good against the maker of it; it is also good against a subsequent registered bill of sale (*Maugham v. Sharpe*, 17 C. B. (N.S.) 443). Where successive bills of sale are given within every successive period of twenty-one days, there, if a fraud is inferable, the attempt to evade the statute fails (*Ex parte Foxley, Re Nurse*, L. R. 3 Ch. 515); but if no fraud is inferable, the evasion succeeds. *Ex parte Harris, Re Pulling*, L. R. 8 Ch. 48.

Mere registration will not make a bill of sale valid in case of the subsequent bankruptcy of the maker, unless possession is taken before the act of bankruptcy on which the adjudication is founded (*Badger v. Shaw*, 29 L. J. (Q.B.) 73; *Stansfield v. Cubitt*, 27 L. J. (Ch.) 266); and conversely, the neglect of registration in such a case will make the bill invalid, although otherwise it would have been good. *Ashton v. Blackshaw*, L. R. 9 Eq. 510.

The Bills of Sale Act expressly exempts marriage settlements from its provisions; but this exemption extends only to antenuptial and not also to post-nuptial settlements. *Ashton v. Blackshaw, supra*.

In the case of a mortgage of land or a message with the fixtures, the Courts used to take this distinction—

(a.) That if the fixtures pass with the land or message under the words of grant (in the case of freeholds, *Mather v. Fraser*, 2 K. & J. 536), or of demise or assignment (in the case of leaseholds, *Boyd v. Shorrocks*, L. R. 5 Eq. 72), then the mortgage deed, being only secondarily and not primarily a bill of sale, requires no registration, even as to the fixtures being tenant's fixtures comprised therein;

But (b.) That if the fixtures did not pass with the land or message under the words of grant (in the case of freeholds) or of demise or assignment (in the case of leaseholds), then the mortgage deed, being primarily and not secondarily merely a bill of sale as to the fixtures being tenant's fixtures comprised therein, required registration as to such fixtures. *Begbie v. Fenwick*, 19 W. R. 402; *Hautrey v. Butlin*, 21 W. R. 633; L. R. 8 Q. B. 290.

But this distinction has unfortunately been exploded. *Ex parte Daglish, In re Wilde*, 21 W. R. 893.*

(D.) Under the Bankruptcy Act, 1869.—

* The distinction is partially restored in *Ex parte Barclay, Re Joyce*, L. R. 9 Ch. App. 576; 22 W. R. 608-610.

FRAUDULENT GIFTS—continued.

By s. 6 of this Act, a fraudulent conveyance, gift, delivery, or transfer by a debtor of his property, or of any part thereof, is made an act of bankruptcy, upon which he may be adjudicated a bankrupt within six months thereafter. By s. 15 of the Act, all goods and chattels being at the date of such act of bankruptcy in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or has acted as owner thereof, vest in the trustee in bankruptcy upon the adjudication in bankruptcy. By s. 87 of the Act, the proceeds of the goods of a trader which have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, are to be retained in the hands of the selling sheriff or bailiff for a period of fourteen days, and upon notice within these days of a bankruptcy petition having been presented against such trader, are to vest (less the sheriff's or bailiff's expenses) in the trustee in the bankruptcy. By s. 91 of the Act, ante-nuptial settlements remain as under the Common Law, and post-nuptial settlements of property coming to the wife, or to her husband (being a trader) in her right during the coverture, are expressly exempted from the operation of the Act, but all other post-nuptial settlements, being voluntary, made by traders on their wives and families are *primâ facie* fraudulent in the case of a subsequent bankruptcy, subject to this distinction, viz.

(1.) If the settlement is made within two years of the bankruptcy, it is *ipso facto* fraudulent and invalid;

(2.) If the settlement is made within ten years, but outside of two years, of the bankruptcy, it is *primâ facie* fraudulent and is invalid, until proof of the absence of fraud is adduced; and apparently

(3.) If the settlement is made outside of ten years of the bankruptcy, it is left to the Common Law, and the *primâ facie* presumption of fraud is excluded.

Also, by s. 92 of the Act, any conveyance or charge made within three months of his bankruptcy by a debtor unable to pay his debts with the intent to favour a particular creditor, is fraudulent and void.

But subject to the aforesaid provisions, the 95th section of the Act enacts, that the following transactions being in good faith and for value shall be valid notwithstanding any prior act of bankruptcy, viz.—

(1.) Any contract regarding, or conveyance of, property made by the bankrupt in good faith and for value before the date of the order of adjudication, with or to a person not having notice of any act of bankruptcy;

(2.) Any execution executed in good

FRAUDULENT GIFTS—continued.

faith against the debtor's land by seizure, or against the debtor's goods by seizure and sale before the date of the order of adjudication on behalf of a creditor not having notice (in the case of lands) before the seizure and (in the case of goods) before the seizure and sale of any prior act of bankruptcy. *Ex parte Villars, In re Rogers, L. R. 9 Ch. App. 432.*

FREEBENCH. A name by which the dower of widows is known in the case of copyhold lands. It is subject to many varying customs, but extends usually to one-third of the lands of which her husband at his death was possessed.

FREEHOLD. A freehold is the holding of a freeman; and as no freeman could originally receive more, or would originally accept less, than an estate for his own life, therefore the original freehold was a life estate. And although, at the present day, as indeed from a very early period, freehold estates of larger quantity than for life are numerous enough, yet the original quality of the freehold is still expressed in the customary definition of that term which is, as commonly expressed, the following:—An estate of freehold is any estate of uncertain duration which may possibly last for the life of the tenant at the least. Whence an estate granted to a widow during her widowhood is an estate of freehold.

FREIGHT. This is the reward which is payable for the carriage of goods by sea, whether in a chartered or in a general ship; the usual time for payment being upon completion of the voyage, although (in charterparties more especially) the payment may be otherwise agreed; e.g., it may be specially agreed that freight shall be paid *in advance*; and when this is so, the amount paid cannot be recovered back, even if the voyage fails, unless there is a distinct agreement to that effect.

Where the freight has not been paid in advance, but, the goods having been duly laden on board, the ship has broken ground, i.e., has fairly started on the voyage, then, although the voyage should afterwards fail, the freight is nevertheless due by Maritime Law; but, in such a case, the shipowner acquires by English Law only a right of action against the freighter, i.e., shipper, for the damage consequential on his breach of contract, and not for freight properly so called (*Curling v. Young, 1 B. & P. 636*). In some cases, however, of a failure of the voyage, freight may be recoverable *pro rata itineris* (Kay's Law of Shipmasters, pp. 309-313). The Court of Admiralty possesses an equitable jurisdiction over questions of freight.

FREIGHT—*continued.*

Recovery of Freight.—No one can be liable to pay freight unless under an express or implied contract for its payment. Moreover, several such contracts may exist simultaneously binding different persons to pay the same freight. For instance, the shipper is liable on his express contract by charterparty, or on the implied one arising from the shipment, and this notwithstanding the bill of lading should state that the freight is to be paid by the consignee or his assigns; and at the same time the consignee or any assign of his receiving the goods under the bill of lading is liable also. But payment of freight by one discharges all; and where cash has been offered by the consignee, but the master has elected to take from him a bill of exchange in payment, and the bill of exchange is afterwards dishonoured, the remedy against the shipper or consignor is gone. *Tapley v. Martens*, 8 T. R. 451.

Shipowner's Lien for Freight.—The shipowner has, independently of contract, a lien on the goods actually carried for the freight due in respect of them, and also for any sum which by the charterparty is to be paid for the hire of the ship; but his lien does not, in the absence of express stipulation to that effect, extend to claims for dead freight, demurrage, wharfage, or port charges. But the shipowner may deprive himself of his lien by the terms of his contract with the shipper; e.g., if the freight is not to become payable until after the goods are to be delivered (*Lucas v. Nockells*, 4 Bing. 729). Moreover, possession is necessary to a lien. If, therefore, the shipowner absolutely demises the ship to the charterer, and thus parts with the possession of her and her cargo, he has no lien for her earnings; but the Courts endeavour to prevent such an effect, even where the terms of the demise are absolute, provided they can find any expression of a contrary intention in the charterparty. Where, as is now common, a ship is chartered at a lump sum, and it is intended to be put up by the charterers as a general ship, and the charterparty provides that the master shall sign bills of lading at such rates of freight as the charterers may direct, without prejudice to the charter, the shipowner's lien remains against the charterers for the charter-freight, and against the holders of the bills of lading for the bill of lading freight, but, in the case of the latter, only to the extent of the freight they have contracted to pay, although it may be less than the charter-freight.

And see the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), ss. 67-78, and Kay's Law of Shipmasters.

FRESH DISSEISIN. Such a disseisin as a man himself might seek to defeat, that is, by his own power, without the help of the king, or judges, or other foreign aid; as when a disseisin had not taken place above fifteen days or other short period. *Britton*, cc. 43, 55.

FRESH FORCE. A force which had been recently committed in any city or borough, as by disseisin, abatement, intrusion, or forcement of any lands or tenements within such city or borough; and before the action of ejectment was introduced the party who had a right to the land might, by the usage of the said city or borough, bring his assize or bill of fresh force within forty days after the force had been committed for the purpose of recovering his lands. *Fitz. Nat. Brev.*; *Les Termes de la Ley*.

FRESH SUIT. When a party robbed diligently and immediately follows and apprehends the thief, or convicts him afterwards, or procures evidence to convict him, this following up of the thief is termed making fresh suit, and the person so robbed shall in such case have restitution of his goods. Fresh suit is also when the lord comes to distrain for rent or service, and the owner of the beasts rescues them or makes *rescous* (as it is termed), and drives them into another man's ground not holden of the lord, and the lord follows and takes them there. 2 Hawk. P. C. c. 23; *Les Termes de la Ley*.

FRIENDLY SOCIETIES. The law as to these societies was consolidated by the stat. 13 & 14 Vict. c. 115. and has been still further consolidated by the stat. 18 & 19 Vict. c. 63. The members of such a society being duly registered are not liable to be sued individually for the debts of the society (*Burton v. Tannahill*, 5 El. & Bl. 797); the only persons liable to be sued are the officers of the society. All disputes within the society, i.e., between any member and the treasurer or other officer of the society, are to be decided in the manner directed by the rules of the society, and such decision is to be binding and without appeal. By the stat. 23 & 24 Vict. c. 58, provision has been made for the winding-up and dissolution of such societies.

FRIVOLUS PLEAS. These are pleas which are clearly insufficient upon the face of them, and are generally (when at all) put in for purposes of delay, or to embarrass the plaintiff. Under the C. L. P. Act, 1852, they may, on motion, be ordered to be at once struck out, *secus*, if the plea is not manifestly frivolous on the face of it. See Day's Practice, p. 88.

FUGITIVE'S GOODS. The goods of a felon who took flight, and which, after the flight, were lawfully found, belonged to the king or to the lord of the manor. 5 Rep. 10 q.

FUNGIBLES. Any moveable goods which may be estimated by weight, number, or measure; hence jewels, paintings, statues, and works of art in general are not considered as fungibles, but, on the contrary, as *non fungibles*, because their value cannot be measured by any common standard; whereas *res fungibles* are money, barley, oil, and such-like, which can be repaid in kind.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which have arisen since the commencement of the suit, and which the defendant puts forward for the purpose of shewing that the plaintiff should not further maintain his action. It is called a plea to the further maintenance of the suit because it does not, like an ordinary plea in bar, profess to shew that the plaintiff had no ground of action when he commenced the suit, but simply shews that he has no right to maintain it further. A plea of payment of money into Court in satisfaction of the plaintiff's claim is in the nature of a plea to the further maintenance of the suit, such a plea admitting that the plaintiff had a good cause of action, but shewing that he ought not further to maintain it, upon the ground that the money so paid in by the defendant is sufficient to satisfy all damages which the plaintiff has sustained. See Step. Pl. 72, 4th ed.

G.

GAGE: See title NANTISSEMENT.

GAME. Under this description are included hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards. 1 & 2 Will. 4, c. 32.

Game chased and killed on the land of A. is his property (*Blades v. Higgs*, 12 C. B. (N.S.) 501, and 13 C. B. (N.S.) 844); *sectus*, where the game is started on another man's ground and killed on the ground of A. *Churchward v. Studdy*, 14 East, 249.

See also titles CHASE; DEER; PARK; WARREN.

GAMING: See title WAGERING.

GAOL: See title PRISON.

GAOL-DELIVERY: See title COURTS OF JUSTICE.

GARANTIE. In French Law corresponds to warranty or covenants for title in English law. In the case of a sale this guarantee extends to two things—(1.) Peaceful possession of the thing sold; and (2.) Absence of undisclosed defects (*défauts cachés*).

GARNISHEE: See title ATTACHMENT OF DEBT.

GAVELKIND. See titles FEUDAL TENURES; ESTATES.

GELD. This is a Saxon word signifying money or tribute. In combination with other words it signifies the compensation for some particular crime, e.g., *werfeld* signifies the value of a man slain; *orfeld*, the value of a beast slain.

GEMOTE. This also is a Saxon word signifying a convention or assembly, e.g., *witenagemote* and *shiregemote* are respectively the assembly of the *witan*, or wise men, and of the *shire* or county, i.e., the freeholders thereof.

GENERAL AVERAGE. Cases of general average arise where loss or damage is voluntarily and properly incurred in respect of the goods on board ship or in respect of the ship for the general safety of both ship and cargo; the loss sustained by the particular owners having ensured to the advantage of the owners generally, it is only equitable to distribute—i.e., adjust the loss rateably over all the owners; and such adjustment is general average. The phrase simple or particular average is an inaccurate and misleading phrase, meaning nothing more than that a particular damage—e.g., the souring of a cask of wine—must rest where it falls.

General average is excluded in the case of particular losses arising from the ordinary risk and perils of the sea (*Power v. Whitmore*, 4 M. & S. 149); and, therefore, in the case of the loss of a mainmast, or damage done to the yards, by winds, &c., there is no general average. The distinction is well stated by Lord Kenyon in *Birkley v. Presgrave* (1 East, 220), in this manner:—That all ordinary losses and damages sustained by the ship, *happening immediately from the storm or perils of the sea* must be borne by the shipowners; but that all those articles which are made use of by the master and crew upon a particular emergency and out of the usual course, for the benefit of the whole concern, must be paid for proportionably as a general average.

The most usual instance of a case for general average is the case of *jettison*, being the *jactus* of the Roman Law (see *LEX RHODIA DE JACTU*); and any damage volun-

GENERAL AVERAGE—*continued.*

tarily and necessarily done to the ship in order to facilitate the jettison, is a general average loss; also, a voluntary stranding of the ship must be made good as a general average, provided the stranding was a proper thing to do, or was prudent and reasonable.

Less usual instances of general average are where part of the cargo is necessarily sold by the master in order to defray the expenses of repairing injuries to the ship which are themselves matters of general average (*The Gratitude*, 3 Rob. 255); also where the ship puts into port in distress owing to an injury which is itself matter of general average, and there are incurred expenses for repairs and for unloading, and also port-charges, seamen's wages, and cost of provisions during the detention (*Da Costa v. Newnham*, 2 T. R. 413); also the expenses of salvage; also the freight of jettisoned goods.

But general average is excluded in respect of the following losses:—The wages and provisions of the crew in cases of detention by embargo; the expenses occasioned by an ordinary quarantine, or by waiting for convoy; also (although with exceptions) deck cargoes that are jettisoned; also damage sustained in resisting capture.

With reference to the articles liable to contribute towards general average, the ship and freight contribute, the former in proportion to its value at the end of the voyage, the latter deducting the expenses of the voyage and the wages of the crew; also, all merchandise put on board for the purpose of traffic must contribute. But the ship's stores and the ship's ammunition do not contribute; as neither do the wearing apparel, luggage, jewels, &c., of the passengers or crew, all these articles being for use and not for traffic.

And see title **ADJUSTMENT OF AVERAGE.**

GENERAL ISSUE, PLEA OF. Under the present practice, this plea is a mere denial of the gist of the action, that is, a denial of the principal fact on which the declaration is founded; and every other matter of defence must be pleaded specially. See R. T. T. 1853. The defence, where appropriate, is available in all sorts of actions and prosecutions, whether founded on contract, or on tort, or in crime, the most common examples of it being "Not guilty," "Never indebted," "Non Assumpsit," "Non est factum," and such like.

In certain cases it is permitted by statute to plead the general issue, and to give the special matter of defence in evidence; and in that case the words "by statute" must be inserted in the margin of the plea. However, under the Act 5 & 6 Vict. c. 97, s. 3,

GENERAL ISSUE, PLEA OF—*continued.*

this form of defence is abolished in the case of local and personal Acts.

GENERAL SHIP. Where a ship is not chartered wholly to one person, but the owner offers her generally to carry the goods of all comers, or where if chartered to one person he offers her to several sub-freighters for the conveyance of their goods, she is called a general ship, as opposed to a chartered one. In these cases the contract entered into by and with the shipowner or master as his agent, is called a bill of lading.

See title **BILL OF LADING.**

GESTIO PRO HEREDE. This is a phrase of Roman Law, and denotes acting as *heres*, i.e., successor, to a deceased person, without having made or before making the *aditio hereditatis*, or entry. See Gaius, ii. 174-8.

GIFT: See title **CONVEYANCES.**

GILD. This word (more commonly spelt *guild*) signifies primarily tribute, and secondarily, the fraternity or company that is subject to the tribute. The company is a body of persons bound together by orders and laws of their own making, the king's licence having been first had to the making thereof. A gild of merchants may be incorporated by grant of the sovereign, and such incorporation, without more, is sufficient to establish them as a corporation for ever. *Guild-Hall* is the name given to the hall of meeting of the gild; the term is applicable to the public place of meeting of the mayor, aldermen, and commonalty of every city and borough, but is applied *par excellence* to the place of meeting of the Lord Mayor, Aldermen, and Commonalty of the City of London.

GLADIUS. This word, which is the Latin for *sword*, was used as the symbol of jurisdiction; a person created an earl was *gladio succinctus*, he having jurisdiction over his county.

GOOD CONSIDERATION. Consists in "blood and natural affection," as opposed to "money and money's worth," which latter constitute a *valuable* consideration. Good consideration is, however, used in the stat. 13 Eliz. c. 5, as the same thing as *valuable* consideration.

GOODWILL. As applied to the sale of a business this phrase denotes the sum of money which any one would be willing to give for the chance of being able to keep the trade connected with the place where it is carried on. It is the purchase of an advantage that is dependent solely upon

GOODWILL—*continued.*

locality: and therefore a sale of the goodwill without a sale or lease of the premises would be impossible and inconsistent; and an agreement for such a sale would therefore not be enforced in the Court of Chancery. *Austen v. Boys*, 2 De G. & J. 626.

GRACE. This word is commonly used in contradistinction to *right*. Thus, in 22 Edw. 3, the Lord Chancellor was instructed to take cognisance of matters of *grace*, being such subjects of equity jurisdiction as were exclusively matters of equity. Again, days of *grace* is a phrase denoting the three extra days allowed by the custom of merchants after the maturity of a bill of exchange for the payment thereof.

GRAND ASSIZE: See title TRIAL BY JURY.

GRAND JURY: See title TRIAL BY JURY.

GRAND SERJEANTY: See title TENURES.

GRANT: See title CONVEYANCES.

GROSS. The phrase "in gross" means standing separate from any corporeal hereditament.

See title INCORPOREAL HEREDITAMENTS.

GROUND-RENT. A landlord, having land conveniently situated for building upon, not unfrequently lets it out to a builder at a trivial rent, for a period usually of ninety-nine years, upon the understanding that the builder-lessee shall, within a fixed time, erect upon it one or more messuages of a specified description. When these messuages are erected, the builder sublets them to occupants, who pay him a rent very considerably larger than what he himself pays to the ground landlord, being, in fact, a rent estimated to repay him with a profit within the ninety-nine years for his labour and outlay in erecting the messuages and taking a lease of the land from his own landlord. The builder's rent, or that which he pays to the ground landlord, is called the ground-rent. Under the stat. 4 Geo. 2, c. 28, the ground landlord may distrain on the premises for this rent; so that it is quite possible that the occupying tenant may have to pay not only his own occupation rent but also the ground-rent, unless proper precautions have been taken.

See also title RENTS.

GUARANTEE. Is a promise to answer for the debt, default, or miscarriage of another person, and for which that other person remains liable. It is usually a simple contract; and the agreement or memorandum expressing or evidencing it must be in writing by the Statute of Frauds, and must contain all the material terms (*Saunders v. Wakefield*, 4 B. & Ald. 595), excepting that

GUARANTEE—*continued.*

under the stat. 19 & 20 Vict. c. 97 (Merc. Law Am. Act, 1856), s. 3, the consideration need not appear in the writing. The guarantee may be either for one particular amount, or for any sum not exceeding that amount, or it may be a continuing guarantee, limited or unlimited in amount; e.g., when A. became bound to B. for any debt which C. might contract with him not exceeding £100, the guarantee was held to be a continuing guarantee, and not extinguished by one dealing between B. and C. to that amount (*Merle v. Wells*, 2 Camp. 413); on the other hand, a bond entered into by A. and B. to the plaintiff to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding £3000 as should at any time thereafter be advanced by the plaintiff to A., was held not to be a continuing guarantee to the extent of £3000 for advances made at any time, but only a guarantee for advances once made to that amount. *Kirby v. Marlborough (Duke)*, 2 M. & S. 18.

See also titles INDEMNITY; PRINCIPAL AND SURETY.

GUARDIAN. There were at one time a great many varieties of guardians of infants, of which the following enumeration comprises the principal—

- (1.) Guardians in chivalry, enduring until the age of twenty-one years, but abolished by the stat. 12 Car. 2, c. 24;
- (2.) Guardians in socage, enduring until the age of fourteen years;
- (3.) Guardians by custom, e.g., of gavelkind lands, enduring commonly till the age of fifteen years;
- (4.) Guardians by nature, enduring till the age of twenty-one years; and for nurture, enduring till the age of fourteen years.
- (5.) Guardians appointed by deed or will in virtue of the Act 12 Car. 2, c. 24, the most common species of guardian at the present day, and enduring till the age of twenty-one years; and
- (6.) Guardians appointed by the Court of Chancery (*ex inquisitione*), and enduring either for a particular purpose only, or generally till the age of twenty-one years;

The guardian appointed under the stat. 12 Car. 2, c. 24, is entitled both to the custody of the person of the child, and to that of the profits of his real and personal estate; and subject to the control of the Court of Chancery he regulates generally the entire conduct of the infant and the entire management of his estate. He cannot make or take any profit thereout.

GUARDIAN—*continued*.

The chief respects in which the Court of Chancery interferes between guardians and infants are the following:—

- (1.) To remove guardians, which it will only do for misconduct upon bill filed establishing a clear case against the guardian;
- (2.) To compel security from guardian;
- (3.) To compel the guardian to render proper accounts;
- (4.) To appoint interim guardians in the absence of the testamentary guardian;
- (5.) To regulate the maintenance and education of the child;
- (6.) To control his marriage; and, generally,
- (7.) To control (without setting aside altogether) the authority of a testamentary guardian (as of a parent himself.)

See also title **INFANTS**.

H.

HABEAS CORPUS. This is a writ directed to the gaoler, or other person having the applicant in custody, requiring him to produce the body, *i.e.*, person, of the applicant in Court before the judge on a day named therein. The right to a *habeas corpus* exists by the Common Law, and its availability only has been facilitated by particular statutes, principally the stat. 31 Car. 2, c. 2 (*Habeas Corpus Act*) and 56 Geo. 3, c. 100 (*In re Bessel*, 6 Q. B. 481). But whether at Common Law or under statute, the writ does not issue as a matter of course upon application in the first instance, but must be grounded on an affidavit, upon which the Court is to exercise a discretion in issuing it or not (*Rez v. Hobhouse*, 3 B. & A. 420). Where a witness is in custody, a *habeas corpus ad testificandum* is issued to bring him up as a witness (1 Arch. Pract. 355; 1 Dan. Ch. Pr. 805); and prior to the C. L. P. Act, 1852, s. 127, where the defendant was in custody at the suit of a third party, it was necessary for the plaintiff to issue a *habeas corpus ad satisfaciendum* to charge him in execution, but under that section a judge's order made upon affidavit that judgment has been signed and is unsatisfied suffices. 1 Arch. Pract. 1209.

HABEAS CORPUS JURATORUM. This was a writ commanding the sheriff to bring up the persons of jurors, and if need were, to distrain them of their lands and goods, in order to ensure or compel their attendance in Court on the day of trial of a cause. The writ was abolished by the C. L. P. Act, 1852, s. 104.

HABENDUM. Is that part of an indenture expressed in the words "To have," and which are usually followed by the words "To hold" (called the *tenendum*). The phrase "to have and to hold," being as a general rule introductory to the declaration of the *uses* to, for, or upon which the lands are granted,—Its office is only to limit the certainty of the estate granted; therefore no person can take an immediate estate by the habendum of a deed when he is not named in the premises; for it is in the premises of a deed that the thing is really granted. 4 Cru. Dig. 272.

HABERE FACIAS POSSESSIONEM.

When a plaintiff recovered in a real or mixed action (both of which forms of action, with the exception of ejectment, have been exploded since 1834), he was awarded a writ for the purpose of putting him in possession of the real or personal property recovered; the writ was called an *habere facias possessionem* in the case of a chattel interest, and *habere facias seisinam* in the case of a freehold interest. And at the present day a writ of *habere facias possessionem* is the process commonly resorted to by the successful party in an action of ejectment, for the purpose of being placed by the sheriff in the actual possession of the land recovered.

See title **EJECTMENT**.

HACKNEY-CARRIAGES. The laws relating to these coaches and cabs within the metropolis are regulated by the stats. 1 & 2 Will. 4, c. 22, 1 & 2 Vict. c. 79, and 17 & 18 Vict. c. 86. They are properly carriages plying for hire off a stand. The driver is liable for negligently losing the luggage of a customer. *Ross v. Hill*, 2 C. B. 877.

HÆRETICO COMBURENDO. The stat. *de hæretico comburendo* (2 Hen. 4, c. 15), was the first penal law enacted against heresy, and imposed the penalty of death by burning upon all heretics who relapsed or who refused to abjure their opinions. It was repealed by the stat. 29 Car. 2, c. 9, which however abolished the penalty of death only, and left the ecclesiastical jurisdiction for the repression of atheism and false religion otherwise unaffected.

See title **TOLERATION**.

HALF-BLOOD. Are children and other persons related to each other through one parent only, whether through the father only, or through the mother only. They were until 1833 excluded from all right of succession to lands, but were admitted by a stat. in that year (3 & 4 Will. 4, c. 106). For the place which they occupy, see title **DESCENTS**.

HANAPER. This is an office connected with the Court of Chancery; writs, with the returns thereto, were kept in the hamper, or hanaper, in all cases in which the question was one affecting the subject only; writs (with the returns thereto), in which the Crown had an interest mediate or immediate being kept in the *petty bag*, which phrase is accordingly used in contradistinction to the *hanaper*. Both the Hanaper Office and the Petty Bag Office belong to the Common Law side of the Court of Chancery.

HANDWRITING. The proof of handwriting is in general by resemblance, and is effected in either or any of the following three ways, namely:—

(1.) *Ex visu scriptiois*, i.e., by the comparison of the disputed writing by a witness who has seen the party in the act of writing;

(2.) *Ex scriptis olim visis*, i.e., by the like comparison by a witness who has had frequent correspondence with the party, or otherwise frequently seen writings of his.

(3.) *Ex scripto nunc viso*, i.e., by the like comparison by a witness who is an expert in characters or letters, and their peculiarities of formation.

The third sub-variety was not admissible by the Common Law, but was first made so by the C. L. P. Act, 1854 (17 & 18 Vict. c. 125, s. 27).

See also title EVIDENCE.

HARBOURS: See title SHIPPING LAW.

HAWKERS. The stat. 50 Geo. 3, c. 41, s. 6, enumerates hawkers, pedlars, petty chapmen, and every other trading person or persons going from town to town or to other men's houses, and travelling either on foot, or with horse or horses, or otherwise, carrying to sell, or exposing to sale, any goods, wares, or merchandise, as the persons who must take out a licence within the meaning of that Act; but no wholesale trader or his servant or agent is to be deemed a hawker: nor are coal agents who carry about and sell by retail coals in carts within the intention of the Act. Any person offending against the Act incurs a penalty not exceeding £40; but under the stat. 23 & 24 Vict. c. 111, the Commissioners of Inland Revenue may remit the penalty, notwithstanding the same, or some portion of it, may be payable to some other party than the Crown.

HEAD-BOROUGH. This was the name of the officer who was at the head of a frankpledge, and who was the chief of the ten pledges (whence called chief-pledge) in a decennary. His nine coadjutors were called *Hand-Boroughs*. His modern equi-

HEAD-BOROUGH—continued.

valent appears to be the head constable of a borough.

See also title POLICE.

HEALTH, PUBLIC. Is secured by a variety of statutes, principally by the Public Health Act, 1818 (11 & 12 Vict. c. 63), the Local Government Act, 1858, and the Acts amending same. Under these statutes large powers are given to the local authorities for removing nuisances, regulating burials, checking the sale of injurious food or drink, and otherwise preventing disease.

HEARSAY: See title EVIDENCE.

HEARTH-MONEY: See title TAXATION.

HEDGE-BOTE. This phrase denotes the allowance of wood for the repair of hedges (sometimes called hays, whence hay-bote) made to a tenant for life, or other tenant with a limited interest.

See title ESTOVERS.

HEIR. As defined by Blackstone, the heir is one "upon whom the law casts the estate immediately on the death of his ancestor;" whence also it is said that the heir cannot *disclaim* the estate of his ancestor (see title DISCLAIMER). It is a maxim of the English Law that God and not man maketh an heir (*Solus Deus heredem facere potest, non homo*); and again it is a maxim of the Roman Law that the law and not the prætor makes an heir (*Prætor heredem facere non potest, lex facere potest*). The two maxims are, however, very different in what they denote, the maxim of the Roman Law merely pointing at the difference between the *hæres* and the *bonorum possessor* (or, roughly speaking, the legal and the equitable owner), and not implying that a testator could not (for in fact he always could) constitute his own heir, whereas the maxim of the English Law, on the other hand, points at the difference between an heir and a devisee, and seeks to denote (with a certain feeling of piety that is characteristic of the early law) the inability of any one to determine for himself amidst the multitude of chances who shall be the successor to his real estate if left to descend in due course of law. The popular use of the term *heir* is a mistake for *devisee*. An heir can only be determined upon the decease of the ancestor (*Nemo est hæres viventis*), and he is the heir whom the canons of descent demonstrate when applied at the date of such decease. See title DESCENT.

The following are various uses of the word heir in combination with other words:—

(1.) *Heir-Apparent.*—Is he who, if he

HEIR—continued.

survive his ancestor, must certainly be his heir and succeed him, *e.g.*, the eldest son in the lifetime of his father.

(2.) *Heir-Presumptive*.—Is he who, if the ancestor were immediately to die, would succeed, but whose right of succession may be defeated by some event other than his own death before the ancestor.

(3.) *Customary Heir*.—Is he who is heir according to any custom, such as that of Borough English, or, in the case of Copyhold lands, upon the death of his ancestor.

The *heres* of Roman Law is more like the executor than the heir of English Law, being both constituted by the appointment of the testator, and taking in general a bare legal estate, which he holds in trust to pass down to or distribute among another or others.

HEIR-LOOMS. Such personal chattels as go to the heir along with the inheritance, as being a *loom*, *limb*, or member, *i.e.*, part thereof. They are properly ancient portraits of former owners, coats of arms, paintings, and such like; and are to be distinguished from another class of personal chattels, often but improperly called heir-looms, which, as being fixed to the inheritance in such a manner as does not admit of their severance from it without damaging the inheritance, go to the heir of the deceased and not to the executor (*see* title *FIXTURES*). A bill in equity will lie for the specific delivery up of heir-looms to the owner of the inheritance. *Pusey v. Pusey*, 1 Wh. & Tud. L. C. 735.

HERBAGE. The liberty which one man hath in or over another man's ground, *e.g.*, his forest, to feed his cattle therein.

See title *COMMON*.

HEREDITAMENT. Is the general name for lands or houses; it may be either a corporeal hereditament, an incorporeal hereditament, or a purely incorporeal hereditament; all which three titles *see*.

HERESY. Is defined in 1 Hawk. P. O. c. 2, as being the offence of holding a false opinion repugnant to some point of doctrine clearly revealed in the Scriptures, and either absolutely essential to a man's salvation or of essential importance in the Christian faith. The penalty for the offence, which in the case of lay persons has gone entirely into desuetude, used to be either death (*see* title *HÆRETICO COMBURENDO*), or excommunication, or other ecclesiastical penalty.

HERIOT. The best beast (whether a horse, ox, or cow) which by the custom of most manors is due to the lord upon the death of his copyhold tenant. Heriots are usually divided into two sorts, heriot-

HERIOT—continued.

service and heriot-custom; the former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatever, but depend solely upon immemorial usage and custom. In some manors it is the best chattel, under which term a jewel or piece of plate is included; but it is always a personal chattel, which immediately on the death of the tenant being ascertained by the option of the lord, becomes vested in him as his property, and is no charge on the lands, but merely on the goods and chattels of the tenant. 1 Cruise, 323.

HIDAGE. By some it is said to signify an extraordinary tax payable to the king upon every hide of land; by others it is said to be an exemption from that tax. *Les Termes de la Ley*.

HIGH COMMISSION. The Act of Supremacy, 1 Eliz. c. 1, restored all ecclesiastical jurisdiction to the Crown, and empowered the Queen to execute the same jurisdiction by commissioners to be appointed under the great seal, and the power of the commissioners, when appointed, was made to extend to all heresies, schisms, abuses, and offences whatsoever which fell under the cognisance of the spiritual authority. After various temporary commissions had been appointed under this Act, a more permanent commission was appointed under it in 1583, during the primacy of Archbishop Whitgift. This last-mentioned commission was the Court of High Commission, commonly so called. It consisted of forty-four commissioners, twelve of whom were bishops, other twelve of them privy councillors, and the rest either clergymen or laymen, all which commissioners were directed and empowered by jury or by witnesses, or by other means of trial, to inquire into all offences or misdemeanours against or contrary to the Acts of Supremacy (1 Eliz. c. 1), and Uniformity (1 Eliz. c. 2), including thereunder the cognisance of all heretical opinions, seditious books, contempts, conspiracies, false rumours, slanders, &c.; also, incests, adulteries, and the like; also, absence from church, &c. And any three of the commissioners, of whom one was to be a bishop, were empowered to examine suspected persons on oath and to punish the refractory by spiritual censures, fines, or imprisonments, at their discretion, with power also to amend the statutes of schools, colleges, &c.

The procedure of the Court was wholly founded on the Canon Law, and the accused was subjected to a series of interrogatories of an exhaustive and searching cha-

HIGH COMMISSION—*continued.*

racter, which he was compelled to answer on oath (called the oath *ex officio*) without evasion, not being allowed the benefit of the Common Law maxim, that no one is bound to criminate himself.

This Court met with the same fate, in the same year, from the same causes, and by the same Parliament, as the Court of Star Chamber. See that title.

HIGHWAY. This is a public way open to all the king's subjects, and leading between two public termini (*Young v. Cuthbertson*, 1 Macq. H. L. 455). The soil of the road is in the freeholders adjoining (*Cooke v. Green*, 11 Price, 736). A highway may be created either by Act of Parliament (*Sutcliffe v. Greenwood*, 8 Price, 535), or by dedication of the freeholder to the public, which dedication must be absolute (*Rez v. Leake*, 2 N. & M. 595), otherwise it is a mere licence (*Stafford (Marquis) v. Coyney*, 7 B. & C. 257). Moreover, the dedication must be in perpetuity (*Daves v. Hawkins*, 8 C. B. (N.S.) 848). Such a dedication may be presumed from long enjoyment (*Pool v. Huskinson*, 11 M. & W. 827); and it is not material to inquire who the precise dedicating owner was (*Rez v. East Mark Tything*, 11 Q. B. 877). If the owner wants to exclude the presumption of a dedication, while at the same time he wishes to let the public pass over it, he should do some act to shew that he gives a licence only; the common course is to shut the way up one day in the year (*British Museum (Trustees) v. Finnis*, 5 C. & P. 460). Where the parish adopts a public way, which becomes such by dedication, it is liable to repair the same, even at Common Law (*Rez v. Leake*, 2 N. & M. 583); and for statutory regulations as to such adoption, see 5 & 6 Will. 4, c. 50 (Highway Act, 1835). A remedy lies by action or indictment for the obstruction of a highway. *Dovaston v. Payne*, 2 Sm. L. C. 132.

HOLDING OVER. This is the phrase commonly used to denote that a tenant remains in possession of lands or houses after the determination of his term therein. Thus, a tenant by sufferance is one who has come in by right and who holds over by wrong. And by the Common Law, a husband who has been in possession during the coverture in right of his wife, and who afterwards (not having qualified by the birth of a child or otherwise to hold over as tenant by the curtesy) holds over, was also a tenant by sufferance, but for his more speedy ejection by the next successor in right he is made a trespasser by the stat. 6 Anne, c. 18, s. 5.

HOMAGE. This was an incident of feudalism, and was so called because the

HOMAGE—*continued.*

tenant thereby acknowledged his tenure as that of the lord's man or vassal (*devenio homo vester*). It is to be distinguished from fealty, another incident of feudalism, and which consisted in the solemn oath of fidelity made by the vassal to the lord, whereas homage was merely an acknowledgment of tenure. If the homage was intended to include fealty it was called liege homage, but otherwise it was called simple homage.

The word homage, or *homagium*, is also a noun of multitude, and denoted the jury of copyholders who made presentment to the lord or his steward of all matters affecting the lands of the manor which had been transacted out of Court. Such presentment has, however, ceased to be required in the great majority of cases since the Act 4 & 5 Vict. c. 35.

HOMICIDE is literally the killing of a human being. It is of the following varieties:—

- (a.) Felonious homicide, and being either murder or manslaughter (see these two titles);
- (b.) Excusable homicide,—as where it occurs by misadventure, or through ignorance, or from necessity; and
- (c.) Justifiable homicide,—as where a sheriff executes, or causes to be executed, a criminal in strict conformity to his sentence; or where a policeman kills a person who resists capture; or where another person commits the act in self-defence; or (in the case of a woman) in defence of her chastity.

HOMINE REPLEGIANDO. This was a writ which lay to replevy a man out of prison, or out of the custody of any private person, in the same manner that chattels taken in distress may be replevied. It was necessary to give security to the sheriff that the man should be forthcoming to answer any charge against him. In *Somerett's Case* (20 St. Tr. 1), it is stated by Mr. Hargreaves in argument that this writ was one (the writ *de nativo habendo* being the other) of the only two writs provided by law for the master's reclaiming a runaway villein.

HONOUR. The seigniority of a lord paramount was so called, while the seigniority of a mesne lord was simply called a seigniority.

HORSES. A person who hires a horse is bound (in the absence of express agreement to the contrary) to provide it with sufficient food during his use of it (*Handford v. Palmer*, 5 Moo. 74); he must also use it in a careful manner, and not drive

HORSES—*continued.*

it when visibly exhausted (*Bray v. Mayne*, Gow. 1). A livery stable-keeper has a lien for his keep and exercise of a horse (*Bevan v. Waters*, 3 C. & P. 520); and other stable keepers may, by special agreement, acquire a similar lien (*Wallace v. Woodgate*, 1 C. & P. 575). Horses standing at livery are liable to be distrained for rent (*Parsons v. Gingell*, 4 C. B. 545). The *stats.* 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, regulate the sale of horses, which must be in fairs or markets; and horses so sold, although stolen, become the property of the purchaser; but the owner of a stolen horse so sold may redeem it upon payment of the price given, 31 Eliz. c. 12, s. 4. As to the sale of horses with a *warranty*, see title **WARRANTY**.

HOTCHPOT. This word is the English equivalent for the Latin *collatio*. It denotes that of two or more persons jointly entitled to share equally in the distribution of property, whether real or personal, any one of them who has received part of his or her share previously to the period of the ultimate distribution must bring into the common property the part so received before he or she is entitled to share in the general distribution. Thus, if the owner of fifty acres has two daughters, and gives one of such daughters twenty acres upon her marriage, and afterwards dies intestate, leaving the two daughters his co-heiresses, the daughter who had already received part shall bring that part into hotchpot, and then take her half share of the original fifty acres, or refusing so to do, shall leave all the remaining thirty acres to her sister. A hotchpot clause is also usual in wills and marriage settlements.

HOUSE-BOTE. This word denotes the right of the tenant for life, or other tenant with a limited interest, to take wood or timber for the necessary repair of houses, &c., part of the lands in tenancy.

See title **ESTOVERS**.

HOUSE-BREAKING : See **BURGLARY**.

HOUSE OF LORDS, JURISDICTION OF. The House of Lords, having been originally interchangeable with the *Aula Regis*, was possessed of a twofold jurisdiction, namely,

- (1.) An original jurisdiction; and
- (2.) An appellate jurisdiction.

This twofold jurisdiction appears from various causes to have fallen in early times into comparative disuse. (1.) The disuse of the original jurisdiction is accounted for by the circumstance that the *Aula Regis* had been divided into, firstly, committees, and secondly, permanent Courts, appropriating to themselves the cognisance of special

HOUSE OF LORDS, JURISDICTION OF—*continued.*

matters; namely, the Court of Exchequer for matters of revenue affecting the Crown; the Court of Common Pleas for matters chiefly of a freehold nature between subject and subject; the Court of Queen's Bench originally for the residuary jurisdiction of the *Aula Regis*, but latterly for a definite but more or less general portion of that jurisdiction; and the Court of Chancery for matters of *grace*. (2.) The disuse of the appellate jurisdiction is accounted for partly by the competency of the jurisdiction of the Courts having original jurisdiction, and more especially by the wide powers of the Court of Chancery, which gave redress in most cases of hardship at Common Law, and partly by the circumstance that the Council or Star Chamber exercised, although illegally, a control over verdicts; and partly also, and perhaps chiefly, by the circumstance that the Court of Exchequer Chamber was established by 31 Edw. 3, st. 1, c. 12, as a Court of Appeal from the Courts of Exchequer and Common Pleas, becoming also a Court of Appeal from the Court of Queen's Bench in virtue of the stat. 27 Eliz. c. 8. Certain it is, at all events, that after the beginning of the fifteenth century the appellate jurisdiction of the House of Lords did fall into disuse, and that it continued in disuse till about the Restoration in 1660, when the jurisdiction of the House of Lords, as well in its original as in its appellate branch, was attempted to be restored.

Thus (1.) With reference to their original jurisdiction.—The Lords did not at the Restoration period hesitate on petition (a) to stay waste on the estates of private persons; (b) to secure the tithes of church livings during vacancies; or generally (c) to interfere in freehold matters affecting a member of their own House. But these pretensions were always objected to by the Commons as an unlawful interference with the ordinary tribunals, and were finally given up in the case, or as a consequence of the case, of *Skinner v. East India Company* in the reign of Charles II. The plaintiff in that case had petitioned the King for redress and restitution in respect of certain losses sustained by him at the hands of the East India Company's agents, they having plundered his property, taken away his ships, and dispossessed him of an island which he had purchased from a native Indian prince. The King transmitted the petition to the House of Lords, and the Lords called upon the East India Company, through their chairman, Sir Samuel Barnardiston (who was an M.P.) to put in their answer to Skinner's complaint. The Company pleaded in bar to the jurisdiction; but that plea was overruled, and eventually judgment was

HOUSE OF LORDS, JURISDICTION OF
—continued.

given for Skinner with £5000 damages. The Company having in the meantime brought the proceedings in the House of Lords to the attention of the Commons, prayed the latter body to interfere and assume jurisdiction in the matter, Barnardiston being a member of their House. The Commons at once took cognisance of their complaint; and the Lords objecting to this unwarranted assumption of jurisdiction on their part, several conferences followed between the two Houses. These conferences proving ineffectual, the Lords and Commons retaliated on each other, the Commons voting Skinner into custody for a breach of privilege, and the Lords committing Barnardiston for the like cause. Subsequently, the Lords released Barnardiston, but the Commons persisting in the dispute, passed a bill vacating all the proceedings in the Lords against Barnardiston. The King ultimately quieted the dispute by recommending an erasure of all proceedings from the journals of the two Houses; and the Lords have never from that time made any pretensions to an original jurisdiction.

(2.) With reference to their appellate jurisdiction,—The Lords, in the opinion of Sir M. Hale, never exercised any such jurisdiction in matters coming from Courts of Equity until the reign of Charles I., or more probably the Restoration in 1660; but in matters coming from the Courts of Common Law, the Lords from a very early time exercised an appellate jurisdiction upon writs of error under commission issuing under the Great Seal. This appellate jurisdiction in both of these its branches, was equally reasonable and proper; but upon its attempted revival after the Restoration in 1660, it was resisted by the Commons, principally (it appears) upon the score of privilege, and not upon any more general grounds. Thus, in 1675, in the case of *Shirley v. Sir John Fagg*, the defendant being a member of the Commons' House, the plaintiff brought an appeal to the House of Lords from the Courts of Equity; whereupon the Commons apprehended the counsel engaged in the case and imprisoned them in the Tower; and although the Lords sent their usher to the Tower to deliver them, they remained in custody for some time longer, the Lieutenant of the Tower refusing to release them without a warrant from the Commons. The King, with a view to staying this dispute between the two Houses, prorogued Parliament for three months; but the dispute was revived upon the re-assembling of Parliament, and the King thereupon again prorogued Parliament, on the latter occasion for eighteen months. Shirley's appeal never came on

HOUSE OF LORDS, JURISDICTION OF
—continued.

again, but the Lords insisted upon their right to an appellate jurisdiction, and have ever since exercised that jurisdiction, although the Commons upon the re-assembling of Parliament passed some [intemperate] resolutions to the effect that there lay no appeal to the House of Lords from Courts of Equity, and that to assist in any such was to betray the rights and liberties of the subject. The appellate jurisdiction in Common Law matters seems not to have been questioned either after or before the Restoration.

HUE AND CRY. This phrase denotes the [old] process provided by the Common Law for the pursuit of felons, and which the sheriff, *semble*, may still put in force. But the modern facilities and provisions for arrest have now, as a general rule, excluded the necessity for it.

HUNDRED COURT. A Hundred Court **HUNDREDOES.** } is much the same as a Court Baron, only that it is larger, and is held for the inhabitants of a particular hundred instead of a manor; it resembles a Court Baron in not being a Court of Record, and in the free suitors being the judges, and the steward the registrar. Hundredors are persons empanelled or fit to be empanelled on a jury upon a controversy arising within the hundred where the land in question lies. The word "hundredor" also sometimes signifies he who has the jurisdiction of a hundred and holds the Hundred Court; and sometimes it is used for the bailiff of a hundred. *Crompt. Juris.* 217.

HUSBAND AND WIFE. This relation, which was anciently called that of Baron and Feme, is fertile in legal consequences, as well in the rights which it confers as in the liabilities which it imposes upon either party to the relation.

Firstly, *The rights of the husband*; and hereunder firstly, in the real estate of the wife; and secondly, in her personal estate.

(1.) In the real estate of the wife, the husband takes the following rights:—

- (a.) The entire rents and profits arising during the coverture; and if he survive the wife, and has had issue by her capable of inheriting,
- (b.) An estate for the residue of his life. See title **COVERTURE**.

But with respect to marriages which are solemnised after the 9th of August, 1870, and real estate coming to the wife afterwards, during the coverture, the wife takes the entire rents and profits thereof independently of her husband (see title **SEPARATE ESTATE**); and the husband is left

HUSBAND AND WIFE—continued.

only his curtesy estate. (M. W. P. Act, 1870.)

(2.) In the personal estate of the wife, the husband has the following rights:—

(a.) All that part of her personal estate that is in possession, or which (being chattels personal) he reduces into possession or (but only if chattels real) alienates during the coverture; and if he survive the wife,

(b.) All that other part of her estate which, as being either choses in action not reduced into possession or chattels real not alienated during the coverture, go to him as her administrator.

But under the M. W. P. Act, 1870 (33 & 34 Vict. c. 93), the wages and earnings of married women from any employment, occupation, or trade, or from the exercise of any literary, artistic, or scientific skill are to be their own separate estate, as are also all investments thereof, and all deposits in savings banks; and further, all personal property coming to married women under an intestacy, and all personal property not exceeding £200 coming to them under a will, are to be their own property; and married women may effect policies of life insurance either on their own or their husband's lives, and such policies are to form part of their own separate estate.

Moreover, in respect of the before-mentioned rights of the husband as well in the real as in the personal estate of the wife, the same are subject to the rule or practice of Equity, called "The Wife's Equity to a Settlement" (*see* title EQUITY to SETTLEMENT), whereby the Court of Chancery in certain cases, and almost, indeed, in the invariable case, sets apart for the wife a proportion of her estate previously to the husband's obtaining the possession thereof.

Secondly, *The rights of the wife*, and hereunder. Firstly, In the real estate of her husband; and, secondly, in his personal estate.

(1.) In the real estate of the husband. If the marriage was solemnised before the 1st of January, 1834, and the wife survives her husband, she is entitled for the residue of her life as *dowress* to one-third part of all the lands of which her husband was at any time during the coverture solely seised for an estate of inheritance (*see* title DOWER); and if the marriage was solemnised after the 1st of January, 1834, she is entitled for the residue of her life, as *dowress*, to one-third part of the lands of inheritance remaining to the husband undisposed of by him, either by deed or will, and whether he was legally seised, or only equitably possessed, of the same lands dur-

HUSBAND AND WIFE—continued.

ing the coverture. But whereas formerly her right of dower, after it had once attached, was indefeasible by any adverse disposition, much less by any adverse declaration of the husband, the right in the case of marriages solemnised since the 1st of January, 1834, is defeasible by disposition, and even by declaration of the husband to the contrary, made or contained by or in any deed or will of his. *See* DOWER ACT.

Thirdly, *The liabilities of the husband*. In respect of his wife, the husband incurs the following liabilities. He is liable to pay all his wife's debts contracted before the marriage, and to provide her with the necessaries of life during the marriage, whether she is living with him, or (from no fault of her own) separate from him. He is also liable on all the contracts of his wife entered into by her with regard to necessaries, and (upon proof of his assent thereto) with regard also to non-necessaries, being articles of a luxurious and expensive kind. However, under the M. W. P. Act, 1870, when the marriage has taken place after the 9th of August, 1870, the husband is not to be liable for the debts of the wife contracted before marriage, but the wife's own separate estate (if any) is to be liable for the same; but under the M. W. P. Amendment Act, 1874, the husband is again subjected to liability for these debts of his wife, but to a limited extent only; *see* 37 & 38 Vict. c. 50, ss. 1-5.

Fourthly, *The liabilities of the wife*. In respect of her husband, the wife used formerly to incur no pecuniary liability at all, but only the duties of obedience and chastity. But under the M. W. P. Act, 1870, when her husband becomes chargeable to the parish, she is liable to an order under the Poor Law Amendment Act, 1868, s. 33, charging her to contribute to the maintenance of her husband; and she is also liable for the maintenance of her children, as a widow was by law already chargeable therewith. Moreover, under the M. W. P. Amendment Act, 1874, *supra*, she is rendered liable, jointly with her husband, for her own debts contracted before the marriage.

See also titles CONJUGAL RIGHTS; MARRIAGE SETTLEMENTS, &c.

HYPOTHECA. This was a term of the Roman law, and denoted a pledge or mortgage. As distinguished from the term *pignus* in the same law, it denoted a mortgage whether of lands or of goods in which the subject in pledge remained in the possession of the mortgagor or debtor, whereas in the *pignus* the mortgagee or creditor was in the possession. Such an *hypotheca*

HYPOTHECA—*continued.*

might be either express or implied: (1.) Express, where the parties upon the occasion of a loan enter into an express agreement to that effect; or (2.) Implied, as, e.g., in the case of the stock and utensils of a farmer (*colonus*), which were subject to the landlord's right as a creditor for rent; whence the Scotch law of hypothec.

The word has suggested the term *hypothecate*, as used in the mercantile and maritime law of England. Thus, under the Factors Act (see that title), goods are frequently said to be hypothecated; and a captain is said to have a right to hypothecate his vessel for necessary repairs. See *Kay's Law of Shipmasters and Seamen*.

See also next title.

HYPOTHEQUE. In French Law is the mortgage of real property in English Law, and is a real charge, following the property into whosoever hands it comes. Such a charge may be either (1) *Légale*; or (2) *Judiciaire*; or (3) *Conventionnelle*. It is *legale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; it is *judiciaire*, when it is the result of the judgment of a Court of Justice; and it is *conventionnelle*, when it is the result of an agreement (which must be express) of the parties.

I.

IDEM SONANTIA. Where two words (usually surnames) sound the same, although spelt differently. In criminal indictments a mistake in spelling the surname is immaterial, so long as the sound is the same, and there is no mistake as to the party, e.g., *Segrave* for *Seagrave*. *Williams v. Ugle*, 2 Str. 889.

IDENTITY. In conveyances of land it is necessary to identify the property sold with that described by the parcels in the title-deeds. This is usually done by a comparison of all maps and the successive descriptions in the successive deeds, coupled with a declaration of identity by some old credible person. And in actions and suits it is often necessary to establish the identity of parties and of deponents; but such evidence need not be strict, as the similarity of name throws the onus of disproving the identity on the party affirming the negative. An affidavit of identity is also required of the names in certificates of births, baptisms, marriages, and burials; otherwise the question of identity is for the jury to determine. *Hubbard v. Lees*, L. R. 1 Ex. 255.

IGNORAMUS (*We are ignorant*). For-

IGNORAMUS—*continued.*

merly the grand jury used to write this word on bills of indictment when, after having heard the evidence, they thought the accusation against the prisoner was groundless, intimating that, though the facts might possibly be true, the truth did not appear to them; but now they usually write in English the words "not a true bill," or "not found," if that is their verdict; whereupon the party is forthwith discharged; and the jury are in so doing said to ignore or throw out the bill. A notable instance of the finding an *ignoramus* was the *Earl of Shaftesbury's Case*, 8 St. Tr. 759, temp. Charles II.

IMMOBILES. These are, in French Law, the immovables of English Law. Things are *immeubles* from any one of three causes: (1.) From their own nature,—e.g., lands and houses; (2.) From their destination,—e.g., animals and instruments of agriculture when supplied by the landlord; or (3.) By the object to which they are annexed, e.g., easements.

IMPANEL. To impanel a jury signifies the entering by the sheriff upon a piece of parchment termed a panel the names of the jurors who have been summoned to appear in Court on a certain day to form a jury of the country to hear such matters as may be brought before them.

IMPARNANCE. An indulgence formerly granted to a defendant to defer pleading to the action until a subsequent term. It is said that the reason of allowing imparlance was to give the plaintiff an opportunity of settling the matter amicably with the defendant without further prosecuting his suit, a practice which is supposed to have originated from a religious principle founded on the text of Scripture, "Agree with thine adversary quickly, whilst thou art in the way with him."—*Matt. v. 25*. Since the 2 Will. 4, c. 39, in actions commenced by the process prescribed by that Act, these imparlances are abolished; and more recently, under r. 31 T. T. 1853, no entry or continuance by way of *imparlance* or otherwise shall be made on any record or roll whatever, or in the pleadings.

See also title CONTINUANCE.

IMPLICATION. This word signifies something implied in law, though not formally expressed in words.

The natural meaning of the word is also the technical one. Such implications are raised both in estates and in rights; e.g., prior to 1 Vict. c. 26, an estate tail by implication arose from words importing an indefinite failure of issue of the donee for

IMPLICATION—*continued.*

life; and although that particular implication is now expressly discontinued by statute, yet similar implications hold good in other matters; also, a subsequent ratification by A. of the contract of B. amounts in law by implication to a previous command on the part of A. to B. to enter into the contract.

IMPOUND. The placing—*i.e.*, confining—cattle, goods, or chattels taken under distress in a lawful pound, which may be either open or close. An open pound is any place in which the owner of the cattle may give them to eat and drink without trespass, and by the Common Law he was in fact bound to do so at his own peril. A pound close is some private place, selected by the impounder, where the owner has no right to enter to them, but the impounder must sustain them, and that without any allowance for it. But now, by 12 & 13 Vict. c. 92, it is enacted that every person who shall impound or confine any animal in any common pound or inclosed place *shall* provide it with food and water; and by the 17 & 18 Vict. c. 60, it is further enacted that the impounder may, in the manner directed by the Act, sell the cattle impounded, or any of them, openly in the public market, and apply the produce of the sale in discharge of the expenses of food and nourishment, rendering the overplus (if any) to the owner of the cattle.

See also titles POUND; POUND-BREACH; and POUND-KEEPER.

IMPRISONMENT FOR DEBT. By the stat. 32 & 33 Vict. c. 62 (The Debtors' Act, 1869), s. 4, it is enacted that no person shall, after the 1st of January, 1870, be arrested or imprisoned for making default in payment of a sum of money, with the following exceptions:—

- (1.) Persons making default in the payment of a penalty, not being a penalty in respect of any contract;
- (2.) Persons making default in the payment of any sum recoverable summarily before a justice of the peace;
- (3.) Persons being trustees or *quasi* trustees making default in the payment of a sum in their possession or under their control, after they were ordered by a Court of Equity to pay the same;
- (4.) Persons being attorneys or solicitors making default in the payment of costs ordered to be paid for misconduct, or in the payment of a sum of money ordered to be paid by them as officers of the Court;
- (5.) Persons being bankrupts or liqui-

IMPRISONMENT FOR DEBT—*contd.*

dating or compounding debtors, making default in the payment of any portion of a salary ordered by any Court of Bankruptcy to be paid; and

- (6.) Persons making default in the payment of sums in respect of the payment of which orders are in the Debtors Act, 1869, authorized to be made, being principally a debt or the instalment of any debt due from such persons in pursuance of any order or judgment of the Court which inflicts the imprisonment; s. 5.

IMPROPRIATE RECTOR. Commonly signifies a lay rector as opposed to a spiritual rector, just as *impropriate* tithes are tithes in the hands of a lay owner, as opposed to *appropriate* tithes, which are tithes in the hands of a spiritual owner.

See titles IMPROPRIATION; TITHES.

IMPROPRIATION. The annexing of an ecclesiastical benefice to the use of a lay person, whether individual or corporate, in the same way as *appropriation* is the annexing of any such benefice to the proper and perpetual use of some spiritual corporation, whether sole or aggregate, to enjoy for ever.

The origin of appropriations is commonly attributed to the policy of the monastic orders, and is explained in this manner: At the first establishment of the parochial clergy, the tithes of the parish were distributed in four parts—one part being assigned to the bishop, one other part for the maintenance of the fabric of the church, a third part for the support and relief of the poor, and the remaining fourth part for the support of the incumbent. The bishops having afterwards received ample endowment from other sources, the tithes were freed of their liability in that respect; and the monasteries by gradually obtaining possession of the tithes, by grant or otherwise, retained the entirety of them to their own use, subject only to maintaining the fabric of the church, supporting and relieving the poor, and discharging by themselves or their deputy (the vicar) the duties of the incumbent. In this manner the tithes became *appropriated* to the monastic bodies; and upon such appropriation being made, the appropriators, and their successors, for ever became the perpetual parsons (*personae*) of the church, and as such might sue and be sued.

Upon the dissolution of the monasteries by stat. 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, all these various appropriations were given to the king by clauses contained in

IMPROPRIATION—continued.

these statutes; and the king having since granted out from time to time to his subjects the tithes so given to himself, there have thence arisen the *impropriations*, or lay parsonages, of the present day.

The appropriation may become disappropriate in either of two ways:

(1.) By the dissolution of the corporation to which the tithes belonged,—an effect which was expressly excluded by the statutes of Henry 8 upon the dissolution of the monastic houses; or

(2.) By the patron's presentment of a clerk, and the subsequent institution and induction of the presentee to the parsonage. If such presentee had a vicar under him, the parsonage was what used to be called a *sine-cure*.

IMPUTATIONS DES PAIEMENTS. In French Law, denotes the same as Appropriation of Payments in English Law. See that title.

IN AUTRE DROIT. In another's right. Thus, when an executor or administrator sues a person for a debt due to the testator or the intestate, he is said to do so *in autre droit*, that is, in right of another, viz., in the right of the testator or intestate, whom he represents. So also a husband, in right of his wife, acquires certain interests in her estates, both real and personal, and may also in her right sue on the contracts of his wife made before marriage, and on all obligations coming to her as the meritorious cause of action during the coverture. The circumstance that any estate or right is held *in autre droit*, while another is held *in son droit*, or in a person's own right, is one of the chief causes which prevent the merger of the two estates or rights in one.

INCENDIARISM: See title ARSON.

INCIDENT. This phrase is properly used to denote anything which is inseparably belonging to, connected with, or inherent in, another thing which is called the principal. Thus, a Court Baron is incident to a manor, and also inseparably incident, so much so that it cannot be severed from it by grant; for a Court is an essential ingredient in every manor, without which it will cease to be a manor. Again, rent is said to be incident to a reversion; i.e., one of the inseparable qualities, or one of the necessary characteristics of a reversion. *Les Termes de la Ley*.

But the word is also used less properly to denote anything which is connected with another thing, even separably. Thus, in the common phrase, "costs of and incidental to" any suit or legal proceeding, the word can only be taken as meaning

INCIDENT—continued.

properly incurred in connection therewith. Also, the incidents of property may be either inseparable or separable, e.g., the right of alienation is separable in Equity, although, *semble*, inseparable at Law, from a fee simple or fee tail estate in lands, or an absolute interest in personal estate.

INCIPITUR (from the Lat. *incipio*—to begin). The beginning or commencement of pleadings, or sometimes of other proceedings. The phrase *entering the incipitur* on the roll may be thus explained. When the contending parties in an action have come to an issue, the plaintiff, in strictness, should enter the same, together with all the pleadings prior thereto, on a roll of parchment called the issue-roll; but this is now seldom done, the commencement of the pleadings only being entered thereon, which is termed *entering the incipitur* (i.e., the beginning) on the roll (1 Arch. Pract. 350; Tidd's Pract.). The entry even of the *incipitur* is now, however, by a recent rule of Court rendered unnecessary. See 1 Pl. R. H. T., 4 Will. 4.

See also title ISSUE ROLL.

INCLOSURE. Provision has been made by numerous Acts in the present reign, following the principal Act, 41 Geo. 3, c. 109 (General Inclosure Act), for the inclosure, exchange, and improvement of commons and other lands, subject to commonable rights and incidents in England and Wales. A board of commissioners is constituted by the Act 14 & 15 Vict. c. 53, and their continuance in office is regulated by the Act 25 & 26 Vict. c. 73. The usual method of procedure is for the commissioners to make an order for allotment, which, in the first instance, is provisional only, but which is afterwards made absolute upon a proper valuation and adjustment of the rights of all the parties concerned. The Court of Chancery has no power, in general, to restrain the commissioners. *Harris v. Jose*, L. R. 1 Eq. 84.

See also titles COMMONS; ROADS; WAYS.

INCORPOREAL HEREDITAMENTS.

These comprise the following varieties of hereditaments:—

(A.) Incorporeal hereditaments simply so called; and

(B.) Purely incorporeal hereditaments.

(A.) Incorporeal hereditaments, simply so called, comprise the following varieties of hereditaments:—

(1.) Reversions;

(2.) Remainders, which again are either

(a.) Vested remainders; or

(b.) Contingent remainders; and

(3.) Executory interests.

INCORPOREAL HEREDITAMENTS — *continued.*

The definitions of these varieties of incorporeal hereditaments are the following :

(1.) A reversion is that estate of the tenant which remains undisposed of, after he has granted a particular estate, or particular estates, out of his own original estate ;

(2.) A remainder is that part of the grantor's own original estate which remains in him after he has granted thereout one or more particular estate or estates, and which he afterwards by the same instrument whereby he creates the particular estate or estates which precede it grants out also, so as to take effect (if at all) subsequently to and upon the determination of the last-mentioned particular estate or estates. And such a remainder is either

(a.) A vested remainder, if (be it ever so small) it is always ready from its creation to its close to come into possession the moment the prior estate or estates (be they what they may) happen to determine ; or

(b.) A contingent remainder, if (be it what it may) it is *not* always ready from its creation to its close to come into possession the moment the prior estate or estates (be they what they may) happen to determine.

(3.) An executory interest is a future estate which in its own nature is indestructible, and which arises when its time comes of its own inherent strength, not waiting for, or depending on, the determination of the prior estate or estates (as the remainder does), but, on the contrary, putting an end to any prior estate or estates which may at the time be subsisting.

There are certain rules which regulate the creation of contingent remainders and executory interests respectively. Firstly, the rules which regulate the creation of the contingent remainder are the following :—

(a.) The seisin, or feudal possession, must never be without an owner ; in other words, every contingent remainder of an estate of freehold must have a particular estate of freehold to support it ; and as a corollary to this first rule, there is also the following rule, viz., every contingent remainder must vest, i.e., become transmuted into a vested remainder or actual estate, during the continuance of the particular estate which supports it, or *eo instanti* that such particular estate determines ; and

(b.) An estate cannot be given to an unborn person for life, followed by an estate to the child of such unborn person.

Secondly, the rules which regulate the creation of the executory interest are the following :—

(a.) An executory interest (not being

INCORPOREAL HEREDITAMENTS — *continued.*

subsequent to an estate tail) must be made to commence (if at all) within the period of any fixed number of lives existing at the date of the instrument creating it and an additional term of twenty-one years, allowing further for the period of gestation, should gestation actually exist ; but if no lives are fixed on, then the term of twenty-one years only is allowed (*see* title *PERPETUITIES*) ; and

(b.) The income of real or personal estate cannot be directed to be accumulated for any longer term than one or other singly (but not two or more together) of the following periods, so as to be given over with or without the *corpus* of the estate to a grantee, or devisee, or legatee, that is to say,—

(aa.) For the life of the grantor or settlor (in the case of a deed) ;

(bb.) For twenty-one years from the death of such grantor or settlor (in the case of a deed), or of the deviser or testator (in the case of a will) ;

(cc.) For the minority of any person living or *in ventre sa mère* at the death of the grantor or testator ; or

(dd.) For the minority only of any person who under the deed or will would for the time being, if of full age, be entitled to the income so directed to be accumulated (39 & 40 Geo. 3, c. 98, commonly called the *Theilussen Act*) (*and see* title *ACCUMULATIONS*).

(B.) Purely incorporeal hereditaments comprise the following varieties :—

(a.) Appendant incorporeal hereditaments ;

(b.) Appurtenant incorporeal hereditaments ; and

(c.) Incorporeal hereditaments in gross.

Firstly, (a.) Appendant incorporeal hereditaments are such hereditaments of an incorporeal character as are necessarily, and have therefore from the earliest of times, been attached to some corporeal hereditament, and never been separated therefrom. They comprise the following three varieties, viz. :—

(1.) A seigniorial appendant (*see* that title).

(2.) A right of common appendant (*see* title *COMMON*) ; and

(3.) An advowson appendant (*see* that title).

Secondly, appurtenant incorporeal hereditaments are such hereditaments of an incorporeal character as are not necessarily or originally attached to some corporeal hereditament, but have been attached thereto either by some express deed of grant, or by

INCORPOREAL HEREDITAMENTS —
continued.

prescription, which presumes a grant. The only example of an appurtenant incorporeal hereditament which need be given is,—

A right of common appurtenant. *See* title **COMMON**.

Thirdly, incorporeal hereditaments in gross are such hereditaments of an incorporeal character as are not attached to any corporeal hereditament, but stand separate and alone. They comprise the following six (among other) varieties:—

- (1.) A seignior in gross (*see* that title);
- (2.) A rent seek (*see* that title);
- (3.) A rent-charge (*see* that title);
- (4.) A right of common in gross (*see* title **COMMON**);
- (5.) An advowson in gross (*see* that title); and
- (6.) Tithes (*see* that title.)

Many of these incorporeal hereditaments in gross may have been at one time incorporeal hereditaments either appendant or appurtenant to some corporeal hereditament, from which in some manner or other they have been separated; and it is a rule of law that when an appendant incorporeal hereditament (e.g., an advowson) is once separated from the corporeal hereditament to which it was theretofore attached, it can never become appendant again, but must always for the future either remain in gross or become appurtenant by some grant, express or presumed.

INCREASE, COST OF. In strictness it is within the province of the jury upon any trial to assess or ascertain the amount of and to award the costs of the action to the successful party; but as the Courts have power *ex officio* to assess the damages against the defendant, it has become the practice for the jury to award to the successful party the nominal sum of 40s. only, and for the Court to assess by their own officer the actual amount; and the amount so assessed, over and above the nominal sum awarded by the jury, is thence called "costs of increase." *Lush's Pr.* 775.

INCUMBENT (from *incumbere*, signifying, as well to possess and keep safely, as to endeavour earnestly, *obnixè operam dare*). Is a clerk duly possessed of or resident on his benefice with cure. It is said there are four things necessary to the being a complete incumbent. 1st. Presentation. That is, the patron's free gift or commendation of his clerk to the parsonage or vicarage, by presenting or offering him to the bishop. 2ndly. Admission of such clerk by the bishop by his allowance or approbation of him after due examination, and by making record of his name

INCUMBENT—*continued.*

accordingly. 3rdly. Institution of such clerk to such benefice by the bishop or collation. 4thly. Introduction, whereby the clerk takes actual possession of the benefice, by taking the keys of the church door, by the ringing of a bell or the like.

INDEBITATUS ASSUMPSIT. That species of the action of assumpsit in which the plaintiff first alleged a debt, and then a promise in consideration of the debt; such promise, however, was not usually an express, but an implied one, the law always implying a promise to do that which the party is legally liable to perform. Now by the C. L. P. Act, 1852, s. 49, all statements which need not be proved, such as the statement of time, quantity, quality, and value, where these are immaterial; the statement of losing, and finding, and bailment in actions for goods and their value; the statement of acts of trespass having been committed with force of arms and against the peace of our lady the queen; *the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements; and all statements of a like kind, shall be omitted.*

For forms of indebitatus counts, *see* Day, C. L. Pract. pp. 237-239.

INDECENT ASSAULT.**INDECENT EXPOSURE.****INDECENT PRINTS.**

These are offences under the Criminal Law, 24 & 25 Vict. c. 100,

s. 52, and other statutes, punishable respectively with imprisonment or fine, or both, and with or without hard labour. *See* Greenwood and Martin's Magisterial and Police Guide, 1874.

INDEMNITY. It is usual to insert in settlements and wills a clause of indemnity for the protection of the trustees acting in the trusts created therein. And where (as not infrequently happens) the trustees at the urgent request of their *cestuis que trust* commit what is technically a breach of trust, but the act is done *bonâ fide*, and for a present advantage, it is not unusual to give, and the trustees have a right to demand, from the *cestuis que trust* requiring them so to act an express deed of indemnity. Such deed may either consist in the personal covenant of the parties, or not only in such personal covenant, but also in the setting apart a fund, called an indemnity fund, to recoup the trustees any outlay which they may have to incur or be put unto in consequence of their having so acted.

See also title **GUARANTEE**.

INDEMNITY, ACTS OF. Acts of Indemnity are such as are passed for the relief of those who have neglected to take the necessary oaths, or to perform other acts required to qualify them for their offices and employments. So Acts of Indemnity, after rebellions, have been passed for quieting the minds of the people, and throwing former offences into oblivion. Similarly, in 1766, when the Privy Council, being driven to do so by an urgent necessity, issued certain Orders in Council without having the authority of any Act of Parliament so to do, an Act of Indemnity was passed in the following year for the protection of all persons concerned in the issuing or execution of the orders.

INDENTURE. Deeds or writings which are cut or indented at the top or side are called indentures. They formerly used to cut them in acute angles (*indar dentium*) like the teeth of a saw, but now they are usually cut, where cut at all, in a waving line on the top. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other; but at length indenting only came into use, without cutting through any letters at all; after which the process of indenting came to serve for little other purpose than to give name to the species of the deed, and accordingly, by the stat. 8 & 9 Vict. c. 106, the necessity for indenting was abolished altogether in the case of ordinary deeds, and by the stat. 24 Vict. c. 9, it was abolished as a requisite in deeds of gift of lands to charities.

INDICTMENT. An indictment is a written accusation brought, or (speaking technically) laid against one or more persons of a crime or misdemeanor preferred to and presented upon oath by the grand jury. Strictly speaking such a written accusation is not called an indictment until the grand jury has heard the evidence against the accused, and pronounced the accusation to be well grounded, or in other words has found "a true bill": and in this case the indictment is said to be found, and the party is said to stand indicted. The person who indicts another man of an offence is sometimes termed the indictor, and he who is indicted the indictee. Hawk P. C.

See also title CRIMINAL INFORMATION.

INDORSEMENT. Any writing on the back of a deed or other instrument is an

INDORSEMENT—continued.

indorsement; thus the receipt for consideration money on the back of a deed is an indorsement; so is the attestation clause when written on the back of a deed. So also in the negotiating bills of exchange, he who writes his name on the back of a bill is termed the indorser, and he in whose favour it is indorsed, the indorsee.

An indorsement is of two kinds, viz., either (1) in blank, or, (2) special. An indorsement in blank (which is much the more usual of the two) is where the indorsing person merely writes his name across the back; an indorsement special is where he prefixes to his own signature on the back the name of a third person expressed as his payee. The effects of the two indorsements are different, an indorsement in blank rendering a bill or note payable to bearer generally, while a special indorsement limits the payment to the special payee named and to no other.

INDUCEMENT. That portion of a declaration or of any subsequent pleading in an action, which is brought forward by way of explanatory introduction to the main allegations. It is somewhat analogous to the preamble in an Act of Parliament, or to the recitals in a deed, and, like them, commonly commences with the word "whereas." Thus in a declaration for libel, all that introductory part which stated "that whereas the plaintiff was a good, true, honest, just, and faithful subject of the realm, and as such had always conducted and behaved himself, &c., &c.," was the inducement, and the matter thus brought forward was thence termed "matter of inducement;" and in general, not being a material or essential part of the pleading, it could not be traversed. But see now, as to the omission of such prefatory words, C. L. P. Act, 1852, s. 61. It commonly happens that in declarations on contract there is no inducement, as the declaration in such cases begins by alleging the contract; on the other hand, in actions for wrongs independent of contract, i.e., on torts, all that part of the declaration which precedes in logical order the statement of the Act which is complained of as wrongful, comprising the allegation of the right, or of the circumstances of the right, is commonly known as the inducement. In actions of trespass for assault and battery and for false imprisonment there is no inducement. Inducements which are calculated to prejudice or embarrass the defendant may be struck out under the C. L. P. Act, 1852, s. 52. If the inducement contain any allegation that is material to the action, it may of course in such a case be traversed.

See also title DECLARATION.

INDUCTION. The giving the clerk or parson corporal possession of the church: and it is generally done by holding the ring of the door, tolling the bell, or some such form. The intention of it is, that the parishioners may have due notice and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. Co. Litt. 300.

INDUSTRIAL AND PROVIDENT SOCIETIES: See title FRIENDLY SOCIETIES.

IN ESSE. In being; in existence. Law writers frequently make a distinction between things which are *in esse*, and those which are *in posse*, or *in potentia*; the one signifying something in existence at the present instant, the other signifying something that may possibly be so at some future time. Co. Litt.

INFANTS, AGE OF. He who has not attained the age of legal capacity, which age is in general fixed at twenty-one years. For certain purposes, however, it arrives much earlier. Thus, in criminal cases, a person of the age of fourteen years may be capitally punished, but under the age of seven he cannot. The intermediate period, between seven and fourteen, is subject to much uncertainty, for the infant between seven and fourteen shall be judged *primâ facie* innocent; yet, if he was *doli capax*, and could discern between good and evil, he may be convicted and undergo execution of death, though he hath not attained the years of puberty or discretion. A male at twelve years of age may take the oath of allegiance; at fourteen is so far at the years of discretion that he may enter into a binding contract of marriage; and at twenty-one he is at his own disposal, may alienate his land, and generally perform all the duties and enjoy all the privileges attaching to a citizen. A female also is at maturity at twelve years of age, and may therefore at that age enter into a binding contract of marriage; and at twenty-one she may dispose of all her property.

The full age of twenty-one years is completed on the day preceding the anniversary of a person's birth; and as, in the computation of time, the law in general allows no fraction of a day, it follows that if an infant is born on the 1st of January, he is of an age to do any legal act on the morning of the last day of December, though he may have lived nearly forty-eight hours (or two days) short of the twenty-one years.

INFANTS, INCAPACITIES OF. An infant may be liable both for tort and in

INFANTS, INCAPACITIES OF—contd.

crime; but with reference to his liability on contract, the law may be stated as follows:—(a.) In the case of contracts for necessities, he is fully liable for these; and as to what are necessities, see that title; (b.) In the case of contracts for non-necessaries, the general rule of law is that infants bind others, but are not bound themselves (*obligant, sed non obligantur*). This general rule is, however, subject to another one, viz., that every contract is *primâ facie* presumed to be for the infant's benefit, and until the contrary is shewn, and he chooses upon attaining his majority to disaffirm it, the law will hold him to it, the contract of an infant in such cases being voidable only, and not absolutely void. In case an infant, upon becoming an adult, chooses to promise to pay a debt incurred during his or her infancy, he or she must put the promise in writing, and personally sign the same, under Lord Tenterden's Act (9 Geo. 4, c. 14). There are, however, some contracts entered into by infants which are absolutely void, and therefore, *ex vi termini*, not confirmable by them upon their attaining full age, e.g., generally such contracts as cannot possibly be for their benefit, such as a bond in a *penal sum*. It is not competent for a plaintiff to treat a breach of contract as a tort, for the purpose of suing the infant on it. *Jennings v. Randall*, 8 T. R. 335. And now under the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), the contracts of infants which were heretofore voidable only, are rendered absolutely void, and as a consequence are not confirmable by them upon their becoming adults.

INFANTS, JURISDICTION OF CHANCERY OVER. The origin of this jurisdiction is in the Crown as *parens patriæ*, whereby the Crown is laid under certain duties towards children, and the discharge of which duties the Crown has committed to the Lord Chancellor sitting in Chancery. An appeal lies to the House of Lords and not to the Privy Council. But now all appeals are to be to the Court of Appeal (intermediate or final) of the High Court of Justice.

An infant is said to become a ward of Court so soon as a bill is filed relative to his estate, or an order for his maintenance is made on summons without suit (*In re Graham*, L. R. 10 Eq. 530). It is not necessary that the infant should have any property in order to found the jurisdiction, although without some property the jurisdiction cannot be either conveniently or profitably exercised. *Wellesley v. Beaufort*, 2 Russ. 21.

The control of the Court over infants extends to their maintenance, education,

INFANTS, JURISDICTION OF CHANCERY OVER—continued.

and marriage; and the Court visits any disregard of its authority in these matters with the punishment of imprisonment for contempt.

See also title **GUARDIANS**.

INFERIOR COURTS. Our Courts of Judicature are classed generally under two heads or divisions, viz., the superior Courts, and the inferior Courts, the former division comprising the Courts at Westminster, the latter comprising all the other Courts in general, many of which, however, are far from being of inferior importance in the common acceptation of the word. Those Courts which are generally understood by the phrase "the superior Courts at Westminster," are the King's Bench, Common Pleas, and Exchequer.

IN FORMÂ PAUPERIS. See **FORMÂ PAUPERIS**.

INFORMATION Informations are accusations for criminal offences, and he who makes such accusations is termed an informer, and are, 1st., in the name of the king only, and these are filed in the Court of King's Bench for the punishment of offences affecting the safety of the Crown, or the interests of the public; and when affecting the king, his ministers, or the state, are filed *ex officio*, by his immediate officer, the Attorney-General; when more particularly affecting individual rights, they are then filed by the king's coroner, or master of the crown office; 2nd., in the name of a king and a subject, or in the name of a subject only. These latter are commonly called informations *qui tam*, from these words in the information when the proceedings were in Latin, *qui tam pro domino rege quam pro se ipso*, &c., and these are usually brought before justices of the peace, upon penal statutes, which inflict a penalty upon conviction of the offender, one part thereof going to the king, and the other part thereof to the informer. The proper matters for informations *ex officio* are such misdemeanours as peculiarly tend to disturb or endanger the king's government, or to molest or affront him in the regular discharge of his royal functions, e.g., seditious libels and riots not amounting to high treason, libels upon the king's ministers, his judges, &c., reflecting upon their conduct in the execution of their official duties, obstructing such officers in the execution of their duties, offences by such officers for bribery or for corrupt or oppressive conduct, and the like.

See also title **CRIMINAL INFORMATION**.

IN GROSS. At large; independent of;

IN GROSS—continued.

not annexed to, or dependent upon anything. The phrase "easements in gross" was used to designate rights of way and the like, enjoyed by an individual or individuals as such, and not as being owner or owners of some adjoining land. But such rights are now called *licences* only, and not easements. Also, powers in gross are those powers (not being simply collateral) which are not appendant or annexed to any estate.

See also title **INCORPOREAL HEREDITAMENTS**.

INHERITANCE (*hereditas*). Such an estate in lands or tenements, or other things, as may be inherited by the heir, and it is divided into inheritance corporate and inheritance incorporate; the former consisting of messuages, lands, and other substantial or corporeal things; the latter consisting of advowsons, ways, commons, and such like, that are or may be appendant or appurtenant to inheritances corporate. *Les Termes de la Ley*.

INHIBITION. A writ to inhibit or forbid a judge from proceeding further in the cause depending before him. There is also another writ of this kind, being one which issues forth from a higher Ecclesiastical Court to an inferior one upon an appeal (Cowel). It is nearly the same thing with Prohibition at Common Law and Injunction in Equity. See those several titles.

INJUNCTION. This is a writ remedial which formerly issued almost exclusively out of the Court of Chancery restraining the commission by the defendant of some act which he is threatening to commit, or restraining him in the continuance thereof. The writ of prohibition (see that title) was until recently the only writ of this nature which might issue out of a Court of Common Law; but under the O. L. P. Act, 1854, and now more completely under the Judicature Act, 1873, every Court may issue injunctions of all kinds.

Injunctions have hitherto been issued chiefly in restraint of two classes of acts, viz. —

- (1.) The institution or continuance of legal proceedings; and
- (2.) The commission of acts *in pais*, of a wrongful nature.

The former of these two groups of cases will no longer be restrained by the Courts of Equity alone, but by all the Courts equally, and probably upon the like grounds with those upon which hitherto Courts of Equity have been induced to act, viz.,—cases where the plaintiff had a legal right, which it was inequitable that he should exercise at law, e.g., upon a bond

INJUNCTION—continued.

or other security obtained by fraud or undue influence (*Tyler v. Yates*, L. R. 11. Eq. 265); or against an executor whose assets have been lost without his act or default; or where a creditor vexatiously sues an executor at law, after a decree has been obtained upon a creditor's bill for administration of assets in Equity. *Perry v. Phelps*, 10 Ves. 38.

The latter group of cases in which Equity would restrain by injunction comprised such cases as the following:—

(1.) Where the case was one for specific performance, and an injunction (which is the negative side of that remedy) was the only available means of enforcing it (*Lumley v. Wagner*, 1 De G. M. & G. 616);

(2.) In cases of waste, where either from the nature of the waste or from the titles of the parties, no writ of waste could be had at law (*Downshire (Marquis) v. Sandys*, 6 Ves. 109; *Garth v. Cotton*, 1 Ves. Sen. 524);

(3.) Nuisances, whether of a public or of a private nature; and

(4.) Infringements of patent, copyright, and trade-marks.

And under the stat. 21 & 22 Vict. c. 27 (Lord Cairns' Act), the Court may award damages either in addition to or in lieu of an injunction in a proper case. *Soames v. Edge*, Johns. 669.

INLAND BILLS OF EXCHANGE.

Bills of exchange are so called when the drawer and drawee are both resident within the kingdom where drawn (Bayley on Bills of Exchange). If the bill is either drawn abroad or made payable abroad, it is a foreign bill and not an inland one.

See also title **BILLS OF EXCHANGE**.

INN. A house where the traveller is furnished with everything he has occasion for while on his way. *Thomson v. Lacy*, 3 B. & A. 283.

A mere coffee-house, or boarding or lodging-house, is not an inn. Upon the keeper of an inn the law throws a peculiar responsibility in guarding the goods of his guests; and if the goods are lost, unless it be through the gross negligence of the owner, the inn-keeper shall be liable; but his liability is limited to goods in the house (*infra hospitium*) and to the goods of regular guests (a resident boarder or lodger not being such a guest). 1 Smith, L. C. 50; *Calye's Case*, 8 Coke, 32; 2 Stephens' BL 133; Cro. Jac. 224.

INNS OF COURT (*hospitia curiæ*). The societies of the Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn, are so called because the students therein do study the law to fit them for practising in

INNS OF COURT—continued.

the Courts at Westminster or elsewhere. These, together with the Inns of Chancery and the two Serjeants' Inns, are said to have formed one of the most famous universities in the world for the study of law; and here exercises were performed, lectures read, and degrees conferred in the Common Law, as they are at other universities in the present day in the Canon and Civil Laws. The degrees were those of barristers (first styled apprentices, from *apprendre*, to learn) who answered to our bachelors; and as the state and degree of a serjeant, *servientis ad legem*, did to that of doctor. These studies are now under the control of the Council of Legal Education, who have endeavoured to re-invigorate them by holding out rewards for excellence in the various branches of legal study, and particularly in Roman Law and Jurisprudence, and by making a certain standard of excellence compulsory upon all students seeking admission to the degree of barrister.

The Inns of Chancery, being Clifford's Inn, Symond's Inn, Clement's Inn, and others, are subordinate to the Inns of Court properly so called.

INNUENDO (from *innuo*, to beck or nod with the head.) That part of the declaration in actions of libel and slander which explains the meaning or points the application of the libellous or slanderous matter complained of. An innuendo is frequently necessary where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation. So where, from the ambiguity of the defendant's expressions, it is doubtful who was meant, it is the proper office of the innuendo to render the allusion clear, by specifically pointing out the meaning, as *e.g.*, where but one or two letters of the name are expressed, or the plaintiff is libelled under a fictitious or borrowed name, or where the libel is couched under a fable or allegory, whose tendency and meaning it is necessary to explain by reference.

See titles **LIBEL**; **SLANDER**.

IN PERSONAM. Against or upon a person, as distinguished from *in rem*, against or upon a thing. An illustration of the distinction existing between these two phrases is frequently furnished by the revenue cases, which are peculiarly within the jurisdiction of the Court of Exchequer. Thus the condemnation of the smuggled goods to the use of the Crown is a proceeding *in rem*, whilst the conviction of the person committing the illegality, though by the same Court and concerning the

IN PERSONAM—*continued.*

same transaction, is a proceeding *in personam*. A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject-matter, as for instance, the sentence of the Court of Admiralty condemning a vessel or prize, or of the Court of Probate and Divorce establishing or nullifying a marriage; which latter case, although clearly affecting the personal position of the parties, is yet included in the class of judgments *in rem*, for it decides the permanent *status* of those concerning whom it was instituted.

Besides being used to denote the diversity in the effect of a judgment according as it is *in rem* or *in personam* as distinguished above, the phrases *in personam* and *in rem* are also used to denote the compass or extent of rights; thus a *jus in rem* has been, and commonly is, defined as a right availing against the world at large (*facultas persone competens sine respectu ad certam personam*); and on the other hand, a *jus in personam* as a right availing against some one individual in particular (*facultas persone competens cum respectu ad certam personam*). But this distinction has reference only to the proximate diversities, for a *jus in personam* also avails remotely against all the world. Austin's Jurisprudence.

INQUEST (*inquisitio*, an inquiry). An inquiry by a jury duly impanelled by the sheriff into any cause, civil or criminal. The term "inquest" is sometimes used to signify the jury itself before whom the question is brought.

INQUIRY, WRIT OF. A writ directed to the sheriff, commanding him to summon a jury, and to inquire into the amount of damages due from the defendant to the plaintiff in a given action. The necessity for this writ, and the inquiry under it, occurs in certain cases when the defendant has suffered judgment to pass against him by default or *nil dicit*, by confession, or *cognovit actionem*, &c., in an action, the damages in which are not ascertained or ascertainable by mere calculation.

In such cases it becomes absolutely necessary that the *quantum* of damages should be assessed by a jury, who, under the presidency of the under-sheriff, ascertain by the evidence of witnesses, as in a trial at Nisi Prius, what damages the plaintiff hath really sustained; and after their verdict the sheriff returns the inquiry, which is entered on the roll in the manner of a *postea*.

INQUIRY OF OFFICE. Is an official inquiry directed by the Crown in certain cases, as a preliminary step to the

INQUIRY OF OFFICE—*continued.*

seizure of property, when that can only be done after "inquest of office," or after "office found."

See also title OFFICE.

INQUISTORS (*inquisitores*). These (who are called also *ministri*), are sheriffs, coroners *super visum corporis*, or the like, who are empowered to inquire into certain cases. Britton, fol. 4.

INROLMENT. The transcribing a deed on to a roll of parchment, according to certain forms and regulations, is termed inrolling a deed. It is a common practice to inrol deeds for safe custody; that is, to get them transcribed upon the records of one of the King's Courts at Westminster, or at a Court of Quarter Sessions. The inrolment of a deed does not make it a record; but it thereby becomes a deed recorded. For there is a difference between a matter of record, and a thing recorded to keep in memory. A record is the entry on parchment of judicial matters controverted in a Court of record, and whereof the Court takes notice; but an inrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done (4 Cruise, 503). The copy of an inrolled deed of bargain and sale is by the stat. 10 Ann. c. 18, s. 3, made as good evidence as the original deed itself.

INSANITY: See title LUNACY.

INSENSIBLE. A term used in pleading to signify unintelligible; and the rule relating to it is, that if a pleading be insensible by the omission of material words, &c., it is bad. Stephen on Pleading, 414.

INSIMUL COMPUTASSENT (*they settled their accounts together*). A species of *assumpsit* so called, because one of the counts of the declaration alleged that the plaintiff and defendant had settled their accounts together, and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do so.

INSOLVENCY. By stat. 7 Geo. 4, c. 57, a Court for the relief of insolvent debtors in England was established; that Court continued until 1861, when it was abolished by the stat. 24 & 25 Vict. c. 134, all its jurisdiction being by that Act transferred to the Court of Bankruptcy; and by the stat. 32 & 33 Vict. c. 83, further provision has been made for the winding up of the late Court of Insolvency. Imprisonment necessarily preceded insolvency proceedings, and the debtor being in prison, petitioned for his discharge, having first

INSOLVENCY—continued.

made a *bond fide* surrender of all his property to his creditors.

See also titles **BANKRUPTCY** and **IMPRISONMENT FOR DEBT**.

INSPECTION, or EXAMINATION. Trial by inspection or examination is such, that when the point or question in dispute is evidently an object of sense, the judges of the Court take upon themselves to decide the question upon the testimony of their own senses; for where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it, that being called to inform the conscience of the Court in respect only of dubious facts. 9 Rep. 31.

INSPECTION OF DOCUMENTS: See title **DISCOVERY**.

INSPEXIMUS (*we have inspected*). Letters patent are so called from the circumstance of this being the first word with which they begin (after the title of the king), thus, "*Rex omnibus, &c., Inspezimus, &c.*" It is the same thing with an exemplification: see that title. *Les Termes de la Ley*.

INSTALMENTS. Are different portions of a debt payable at different successive periods as agreed.

INSTANTER. Immediate, without loss of time. In this sense it is used when applied to the word trial; thus, a trial *instanter*, means an immediate trial, a trial that is to take place forthwith.

INSTITUTION. A kind of investiture of the spiritual part of the benefice, as induction is of the temporal; for by institution the care of the souls of the parish is committed to the charge of the clerk. By institution, the church is full, so that there can be no fresh presentation till another vacancy, in the case of a common patron; and the clerk may enter upon the parsonage house and glebe, and take the tithes; but he cannot till induction grant or let them, or bring an action for them.

INSURANCE, or ASSURANCE. A security or indemnification, given in consideration of a sum of money, against the risk of loss from the happening of certain events. The person who so insures is termed the insurer, and he whose property is insured is termed the insured, or assured, and sometimes, *assurée*; and the instrument by which he effects such insurance is termed the policy of insurance. A policy of insurance may be defined to be a contract between two persons, stipulating that

INSURANCE, or ASSURANCE—contd.

if one pay a sum of money (or premium), estimated to be an equivalent to the hazard run, the other will indemnify (or insure) him against the consequences which may ensue from the happening of any particular event. Thus, if I pay an insurance company 10s. a year to indemnify me against the loss which I might sustain by my house being burnt down, this is termed insuring my house, the company undertaking, in consideration of the money which I pay, to give me a certain sum to rebuild it in case of fire. The same system is pursued in the insurance of ships (commonly called marine insurance), and in the insurance of the lives of individuals, commonly called life insurance.

There is this difference between life insurance policies and all other kinds, that the latter are contracts of indemnity merely, and the moneys secured thereby cease to be payable if no damage arises; but the former if duly kept up until the death of the party assured, are payable at all events. *Dalby v. India and London Life Assurance Co.* (15 C. B. 365).

For the validity of a life-assurance policy, it is, however, necessary that the person who takes it out should have some interest in the life assured at the time of his so taking it out (14 Geo. 3, c. 48); but the subsequent cessation of such interest does not vitiate the policy. *Wms. P. P.* 177.

INTENDMENT. Understanding, meaning, or construction, is so called.

See also title **COMMON INTENDMENT**.

INTERCOMMONING. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called intercommoning. *Les Termes de la Ley*.

INTERDICT (*interdictio*). An ecclesiastical censure, prohibiting the administration of divine service in particular places, or to particular persons. 22 Hen. 8, c. 12.

As used in Roman Law, an interdict was equivalent to the injunction in equity, and see next title.

INTERDICTION. In French Law, a person over twenty one years of age, if he is in an habitual state of imbecility or insanity, may be excluded the management of his goods, upon the application of any of the relatives, whom failing, upon the application of the Attorney-General (*procureur du Roi*), to the Court of first instance, who will thereupon direct an inquiry before the *conseil de famille*. The interdiction may be either absolute or limited; in the case of a limited interdiction, the

INTERDICTION—continued.

party is able to act with the approval of a *conseil judiciaire*, see that title.

INTERESSE TERMINI (*An interest in the term*). That species of property or interest which a lessee for years acquires in the lands demised to him, before he has actually become possessed of those lands; as distinguished from that property or interest vested in him by the demise, and also reduced into possession by an actual entry upon the lands and the assumption of ownership therein, and which is then termed "an estate for years." Thus, where an estate for years in lands is granted to commence at a future period, the grantee, of course, cannot enter until that period has arrived; but still he has acquired a kind of estate or at least interest in the lands; and the estate or interest so acquired, and which he would continue to have until the period at which the term was to commence, had arrived, and he had entered upon the possession of the lands, would be simply an *interesse termini*. 1 Cru. Dig. 239.

INTEREST. In its legal signification, means the estate or property which a man possesses either in land or chattels, the quantum of which, of course, depends upon the title under which he holds, and which, therefore, varies in exact proportion to the different titles under which property can be held. Thus, in land a man may be possessed of a freehold interest, or of an interest less than freehold; which main classification may again be divided into his interest in fee-simple, fee-tail, or for life, or his interest for a term of years, or at will. So also with regard to the interest or property in goods and chattels, it may be either joint or several; joint, if shared with others (as with the part owners of a ship), several, if possessed by one person exclusively or by more than one, their interests however, not being in common.

See title **ESTATE**; also title **INTERESSE TERMINI**, and next title.

INTEREST OF MONEY. Called also *Usury*, was not favoured by the English Common Law, being apparently thought unchristian. However, the custom of merchants gradually introduced it in the following cases, in all of which it is therefore payable without any express agreement for that purpose:—

- (1.) On bills of exchange;
- (2.) On promissory notes;
- (3.) On bonds; and
- (4.) On mortgages.

Interest is also payable, even by the Common Law, in the following cases:—

- (5.) Under an express contract to pay it;

INTEREST OF MONEY—continued.

- (6.) Under a contract to pay it, which is implied from previous dealings between the parties.

Equity always favoured the allowance of interest upon money lent or owing, when the amount was either certain or ascertainable, and invariably in such cases from a demand made for payment followed by a refusal to pay; and now under the stat. 3 & 4 Will. 4, c. 42, s. 28, "Upon all debts or sums *certain* payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable: (a) if such debts or sums be payable by virtue of some written instrument at a certain time; or (b), if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment."

INTERLOCUTORY (from Latin *inter-locutor*). Something intervening or happening between the commencement of law proceedings and their termination, i.e., during the progress of an action at Law or a suit in Equity; thus, an interlocutory decree in a suit in Equity signifies a decree that is not final and does not conclude the suit, for it seldom happens that the first decree can be final; for if any matter of fact is strongly controverted, the Court usually directs an inquiry in Chambers to be made, after which the matter is to come on again for further consideration, and the final decree is therefore suspended until the result of such inquiry is made known. An interlocutory judgment in an action at law signifies a judgment that is not final, but which is given upon some plea, proceeding, or default, occurring in the course of the action, and which does not terminate the suit; such are judgments on demurrer, or verdict for the defendant on certain dilatory pleas called pleas in abatement, or those which are given when, although the right of the plaintiff in the action is established, yet the amount of damages he has sustained is not ascertained, which cannot be done without the intervention of the jury. This happens when the defendant in an action suffers judgment by default, or confession, or upon a demurrer, in any of which cases, if the demand sued for be damages and not a specific sum, then a jury must be called to assess them; therefore the judgment given by the Court previous to such assessment by the jury is interlocutory

INTERLOCUTORY—*continued.*

and not final, because the Court knows not what damages the plaintiff has sustained. An interlocutory order is an order made during the progress of a suit upon some incidental matter which arises out of the proceedings, as an order for an injunction, for instance. *Smith's Action at Law*, 179.

INTERNATIONAL LAW. As opposed to Municipal, *i.e.*, Civil, Law, is the law common to nations generally. It is either public or private, as to which generally see *Woolsey on International Law*, and see also particular titles throughout.

INTERPLEADER. When two or more persons claim the same thing of a third, and he, laying no claim to it himself, is ignorant which of them has a right to it, and fears he may be prejudiced by their proceeding against him to recover it, he may file a bill in equity against them, the object of which is to make them litigate their title between themselves instead of litigating it with him, and such a bill is called a bill of interpleader. Or he may, in certain cases, resort to a Court of Law for the same purpose.

The jurisdiction at Law in interpleader was originally confined to the single case of joint bailment (*Crawshay v. Thornton*, 2 My. & Cr. 21), *i.e.*, to cases in which the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, had a common origin; but now under the C. L. P. Act, 1860, s. 12, this community of origin in the titles of the interpleading parties is no longer necessary. But the titles must at Law still be legal in their character, and not equitable. Whence the remedy in Equity is still more extensive than that at Law. The grounds of an interpleader suit in Equity are the following:—

(1.) That the plaintiff has no personal interest, either in respect of rights (*Mitchell v. Hayne*, 2 S. & S. 63), or in respect of liabilities (*Crawshay v. Thornton*, *supra*) in the subject matter;

(2.) That the adverse rights of the defendants are such as can be finally determined in the interpleader suit; but

(3.) These rights may be legal or equitable, either all or some of them indifferently, unless the jurisdiction should be exclusively at Law.

The interpleader statute at Law is 1 & 2 Will. 4, c. 58, and see *Day's C. L. Prac.* pp. 353-364, and notes.

INTERPRETATION. This consists in ascertaining the true meaning of the words and conduct of men.

Firstly, with reference to wills, the fol-

INTERPRETATION—*continued.*

lowing six rules of interpretation are generally recognised:—

(1.) A testator is always presumed to use words according to their strict and primary acceptation, until from the context of the will it appears that he has used them in a different sense.

(2.) Where there is nothing in the context of a will shewing that the testator has used words in other than their strict and primary acceptation, and his words when so interpreted are sensible with reference to extrinsic circumstances, then the words are to be interpreted in their strict and primary sense and in no other, notwithstanding the strongest presumption to the contrary.

(3.) But where the testator's words when so interpreted are insensible with reference to extrinsic circumstances, then the extrinsic circumstances may be looked into for the purpose of arriving at some secondary or popular sense which shall be sensible with reference to these circumstances.

(4.) Where the written characters of the will are difficult to decipher, or the words of the will are in an unknown or unusual language, the evidence of persons experienced in deciphering written characters or acquainted with the language, is admissible for the purpose of informing the Court or judge.

(5.) Extrinsic evidence is also admissible for the purpose of identifying the *object* of the testator's bounty (whether devise or legatee), and for the purpose also of identifying the *subject* of disposition.

(6.) Where the words of a will remain unintelligible after the application of the five preceding rules, the will is void for uncertainty.

Secondly, with reference to other instruments. The principal rules regarding the interpretation of these are the following:—

(1.) The agreement shall have a reasonable construction according to the intent of the parties;

(2.) The construction shall be liberal and favourable, *ut res magis valeat quam pereat*;

(3.) The popular meaning of the word is to be adopted until proof of a preciser technical or acquired meaning;

(4.) Every word is to be regarded in the light of its context, *ex antecedentibus et consequentibus optima fit interpretatio*;

(5.) An erroneous particularisation does not affect a precedent generality that is true (*falsa demonstratio non nocet, cum de corpore constat*); and *vice versa*, a subsequent generality shall be confined by the precedent particularisation (this is called the construction *ejusdem generis*);

(6.) Custom shall control a contract, unless the contract exclude the custom (this

INTERPRETATION—*continued.*

is an application of the rule *Lex loci actus*; see that title);

(7.) The words of a deed are to be construed most strongly against the grantor (*verba cartarum fortius accipiuntur contra proferentem*); but this rule is only to be relied upon when other rules of construction fail (*Lindus v. Malrose*, 3 H. & N. 177);

(8.) Every contract binds the executor or administrator of the party, although he be not named; but to bind the heir, he must be particularly mentioned; and

(9.) Parol evidence may in certain cases be admitted in connection with written agreements.

See title **EXTRINSIC EVIDENCE**.

INTERROGATORIES. The examination of the parties to a Chancery suit is not ordinarily conducted *visà voce* in open Court (as is the case in Common Law Courts), but upon written questions previously prepared by counsel, which are called interrogatories; hence the phrase examining a witness upon interrogatories. And since the Act, 17 & 18 Vict. c. 125, ss. 51-57, interrogatories may, subject to certain restrictions, be also exhibited at Law by either party to the action. But whereas in Equity there is almost no question which the plaintiff may not extract from the defendant by means of interrogatories, the practice at Law is subject to the following restrictions:—

(1.) Interrogatories must not be made the means of evading the rule which requires the production of primary evidence (*Herschfield v. Clark*, 11 Exch. 712);

(2.) Interrogatories do not deprive a witness of his privilege; consequently, he will not be compelled to state the contents of, or to describe documents which are his muniments of title, nor (except under very special circumstances) to answer questions tending to criminate him, or to expose him to penalties or forfeitures; and

(3.) Fishing interrogatories will not be encouraged, either at Law or in Equity.

INTERVENER. The interposition or interference of a person in a suit in the Court of Probate and Divorce in defence of his own interests is so termed, and a person is at liberty to do this in every case in which his interest is affected either in regard of his property or his person. Thus, in a matrimonial cause, if proceedings be taken against a party who has either solemnised or contracted marriage with another, such other or third party may, if he or she pleases, interpose in such suit to protect his or her own rights in any part or stage of the proceedings, even after the conclusion of the cause. The Queen's Proctor may also in a proper case inter-

INTERVENER—*continued.*

vene under the stat. 23 & 24 Vict. c. 144, as in case of suspected collusion between the parties. *Dering v. Dering*, L. R. 1 P. & M. 531.

INTESTATE. Without making a will. Thus a person is said to die intestate when he dies without making a will, or dies without leaving anything to testify what his wishes were with respect to the disposal of his property after his death. This word is not only applied to the above-mentioned condition in which a person dies, but is often used to signify the person himself. Thus, in speaking of the property of a person who died intestate, it is common to say the intestate's property, i.e., the property of the person dying in an intestate condition. An intestate is the opposite to a testator, the latter word signifying a man who dies having made a will. It was a rule of the Roman Law that no one could die partly testate and partly intestate (*neque enim idem ex parte testatus et ex parte intestatus decedere potest*, Just. ii. 14. 5); but nothing is more common in English Law than that the same man should die testate as to part, and intestate as to the rest of his property, unless indeed he has made a residuary bequest or devise, and even in that case a partial intestacy is not infrequent.

INTRUSION (*intrusio*.) A species of injury by ouster, or amotion of possession from the freehold, being an entry of a stranger, after a particular estate of freehold is determined before him in remainder or reversion, as when a tenant for life dies seized of certain lands and tenements, and a stranger enters thereon after such death, and before any entry made by him in remainder or reversion (F. N. B. 203, 204; 1 Cruise, 161, 316). The word is also applied to copyholds, when a stranger enters or intrudes before the reversioner or remainderman, after the determination of the particular copyhold estate. The writ which lay against such intruders was also called a writ of intrusion. *Les Termes de la Ley*; Old Nat. Brev. 203.

IN VENTRE SA MÈRE (*in its mother's womb*.) Every legitimate *enfant in ventre sa mère*, or in its mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or of receiving a surrender of copyhold lands; so if lands be devised to B. for life, remainder to such child or children as shall be living at the time of his decease, a posthumous child will take equally with those who were born before B.'s death (*Doe v. Clark*, 2 Hen. Bl. 399; *Pearce v. Carrington*, L. R. 8 Ch. App. 969). But in the case of

IN VENTRE SA MERE—*continued.*

lands, the produce or profits go in the interim to the heir-at-law, or residuary devisee (if there be any such). *Hopkins v. Hopkins*, Ca. t. Talb. 44, and *Tud. Convey.* L. C. p. 711.

INVESTITURE (from the Fr. *investir*).

A ceremony which accompanied the grant of lands in the feudal ages, and consisted in the open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the *æra* of their new acquisition at the time when the art of writing was very little known, and thus the evidence of the property was reposed in the memory of the neighbourhood, who in case of disputed title were afterwards called upon to decide upon it.

IRELAND. By the stat. 3 & 4 Will. 4, c. 42, s. 7, no part of the United Kingdom of Great Britain and Ireland shall be deemed to be beyond the seas, within the meaning of the Statutes of Limitation, as to personal actions, nor is it beyond seas within the meaning of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). By s. 7 of the last-mentioned Act, every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, and made payable in or drawn upon any person resident in any part of the said United Kingdom, shall be deemed to be an inland bill, excepting (if at all) as to the stamp duty. Nevertheless, under the C. L. P. Act, 1852, a 18, a writ of summons cannot be issued against or served upon a British subject residing in Ireland, in respect of a cause of action accruing in England. It is a rule of law, that every Act of Parliament since the Union (1801) embraces Ireland, unless that country is expressly excluded. *Reg. v. Mallow Union*, 12 Ir. L. R., Q. B., 35.

IRREPLEVABLE or IRREPLEVABLE.

Not to be replevied, or set at large on sureties (Cowel). It is contrary to the nature of a distress for rent to be irrepleviable. Tomlins.

ISSUABLE PLEA. An issuable plea is that which puts the merits of the cause, either on the facts or law, in issue; in other words, which will decide the action (*Steele v. Harmer*, 14 M. & W. 139). It seems, however, to be by no means clear that a plea to be "issuable" must put the substantial or moral merits of the cause at issue. Thus, a plea which goes simply to shew that the plaintiff had no present cause of action, as in an action by an attorney for work and labour, that the plaintiff had not delivered a signed bill a month before

ISSUABLE PLEA—*continued.*

action brought, has been held an issuable plea (*Wilkinson v. Page*, 1 Dowl. & L. 913); see also *Staples v. Holdsworth*, 4 Bing. N. C. 144). Where the Court grants an extension of time, or other like indulgence to a defendant, it is generally upon this condition (among others) that within that extended time he shall "plead issuably." See Smith's *Action at Law*.

ISSUE (*exitus*). Is the disputed point or question to which the parties in an action have narrowed their several allegations, and upon which they are desirous of obtaining the decision of the proper tribunal. When the plaintiff and defendant have arrived at some specific point or matter affirmed on the one side and denied on the other, they are said to be at issue (*ad exitum*, i.e., at the end or result of their pleading); the question so set apart is called the issue, and is designated, according to its nature, as an issue in fact, or an issue in law. If it is an issue in fact, it is almost universally tried by the country (i.e., a jury of twelve men); if an issue in law, by the judges of the land constituting the Court in which the action has been brought. Steph. on Pleading, 25, 4th edit.

ISSUE ROLL. In ancient times it was the practice of the Courts, when the pleadings were carried on orally, to have a contemporaneous record of the proceedings made out upon a parchment roll called the "Issue Roll." This practice, although long grown into disuse, was until recently still supposed in contemplation of law to exist; and the Courts still required that it should be made up, or at all events commenced, or an *incipitur*, as it was called, was entered upon the roll, and certain fees were paid to the officers for the making it up. Practically, however, this roll was of no use, and in consequence it was by a late rule of Court abolished; and the only entry of the proceedings upon record, in the present day, is that made upon the *Nisi Prius* Record, or upon the Judgment Roll, according to the nature of the case, and no fees are allowed to be paid in respect of any other entry made or supposed to be made upon any roll or other record whatever. 1 Pl. R. H. T. 4 Will. 4.

ITINERANT. Travelling or moving about; thus the judges who are now called justices of assize, were formerly called justices itinerant, from the circumstance of their travelling into several counties to hear causes ready for trial (3 Bl. 59). These judges were appointed for the first time by King Henry II., at the Parliament of Northampton, in 1187.

J.

JACENS HEREDITAS. An estate in abeyance. This was one of the fictitious *personæ* of law referred to by Austin. It was supposed to continue the *persona* of the deceased person, until the entry (*aditio*) of the *hæres* (executor) upon the estate. In English Law, the authority of the executor or administrator arises from the grant of probate or administration; and until such grant is made, the Judge Ordinary is the only legal personal representative of the deceased; but the subsequent grant to the executor or administrator when made relates back (for most purposes) to the date of the death.

JACTITATION (*jactitatio*). A false boasting. The word is commonly used with reference, 1st, to marriage; 2nd, to the right to a seat in a church; and, 3rdly, to tithes.

(1.) *Jactitation of marriage* is the boasting or giving out by a party that he or she is married to some other, whereby a common reputation of their matrimony may ensue. To defeat that result, the person may be put to a proof of the actual marriage, failing which proof she or he is put to silence about it.

(2.) *Jactitation of a right to a seat in a church* appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

(3.) *Jactitation of tithes* is the boasting by a man that he is entitled to certain tithes, to which he has legally no title. See Rog. Eccl. Law, 482.

JEOPFAILE (from the Fr. *j'ai faillé*, I have failed). An oversight in pleadings or in other law proceedings. The Statutes of Jeofails are so called because when a pleader perceives any mistake in the form of his proceedings, and acknowledges such error (*j'ai faillé*), he is at liberty by those statutes to amend it (Stra. 1011). These old statutes have been superseded in effect by the more liberal powers of amendment conferred by the U. L. P. Act, 1852.

See title AMENDMENT.

JETSAM, JETSON, or JETTISON. By this appellation are distinguished goods which have been cast into the sea, and there sink and remain under water (2 Steph. Bl. 557). Jetsam is in this respect distinguished from *Flotsam*, where the goods remain swimming on the surface of the waves, and from *Lagan*, where they are sunk, but tied to a buoy or cork in order to mark their position, so that they may be found again.

JETSAM, JETSON, or JETTISON—contd.

The king, or his grantee, shall have *flotsam, jetsam, or lagan* when the ship is lost and the owners of the goods are unknown. F. N. B. 122.

JEW: See TOLERATION ACT.

JOINDER. Joining, uniting together, &c. Thus, joinder in action signifies the joining or uniting of two persons together in one action against another; and such an action is termed a joint action. Joinder of issue is where the plaintiff or plaintiffs and the defendant or defendants unite upon a statement of their respective grounds of action and defence, and agree to stand or fall by that statement.

JOINDER IN DEMURRER. When a defendant in an action tenders an issue of law (called a demurrer), the plaintiff, if he means to maintain his action, must accept it, and this acceptance of the defendant's tender, signified to the plaintiff in a set form of words, is called a joinder in demurrer. The usual words of a demurrer are,—“The defendant (or plaintiff) says that the declaration (or plea) is bad in substance;” and it is necessary to state in the margin some substantial matter of law intended to be argued. Thereupon the other side joins issue on the demurrer in these terms.—“The plaintiff (or defendant) says that the declaration (or plea) is good in substance.”

JOINDER OF ISSUE. In an action at law, in any stage of the pleadings, when either side traverses or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called, which, if the other party accepts, issue is said to be joined. Smith's Action at Law.

JOINT AND SEVERAL. A joint and several bond is a bond in which the obligors have rendered themselves both jointly and individually liable to the obligee; so that the latter, in the event of the non-performance of the conditions of the bond by the obligors, may sue them either jointly or separately as he deems the more advisable. The phrase is also frequently used with reference to contracts not under seal (i.e., simple contracts), and it often becomes a matter of serious moment to know whether a given contract is a joint or a several contract. Thus, where a broker was employed to sell a ship belonging to three part owners, two of whom communicated with him on the subject, and to them he paid their shares of the proceeds of the sale; but after admitting the amount of the third part owner's share to be in his hands, refused to pay it to him without the consent of the other two, and

JOINT AND SEVERAL—continued.

he alone brought an action for his share, it was held that he could not sue alone, but should have sued jointly with the other two part owners: 1 Ch. Pl. 9, 6th edit.; 1 Saund. 153, n. (1).

JOINT INDICTMENTS. When several offenders are joined in the same indictment, such an indictment is called a joint indictment; as when principals in the first and second degree, and accessories before and after the fact, are all joined in the same indictment. 2 Hale, 173.

JOINT STOCK COMPANIES. A joint stock company established before the passing of the Acts presently mentioned, and which has not adopted their provisions, is simply a partnership (see that title), consisting of a large number of members, whose rights and liabilities are precisely the same as those of any other sort of partners, subject only to the peculiar regulations contained in an instrument called a deed of settlement. The capital is divided into equal parts called shares, each member of the company has a certain number of these, and is entitled to participate in profits according to his number of shares. The management of the business is confided to some few shareholders, called directors, and the general body of the shareholders have, unless on extraordinary occasions, no power to interfere in the concerns of the company.

It was not unusual for such companies to obtain a private Act of Parliament in aid of their deed of settlement; and at length certain general Acts were passed for the regulation of such companies. The result of the various legislative measures of a general character so passed may be stated as follows:—

I. Joint stock banking companies—
(1.) All such companies, if formed under 7 Geo. 4, c. 46, and not registered since, are governed by that Act and their deed of settlement. (2.) All such companies, if formed and registered under the Act of 1857 (20 & 21 Vict. c. 49), are governed by their deed of settlement, and so much of the Companies' Act, 1862, as applies to companies registered, but not formed under it. (3.) All such companies, if formed under the 20 & 21 Vict. c. 14, and 21 & 22 Vict. c. 91, are governed by their rules and articles of association and the Companies Act, 1862. Lastly, (4.) All such companies, if formed under the Companies Act, 1862 (25 & 26 Vict. c. 89), are governed exclusively by the provisions of that Act.

II. Joint stock companies other than banks—and hereunder the following principal classes, viz. :—

(1.) Companies incorporated by statute

JOINT STOCK COMPANIES—continued.

or charter, and companies for executing any bridge, road, railway, or other like public object, not capable of being carried out unless with the authority of Parliament, and being the companies expressly excepted from the operation of the Act 7 & 8 Vict. c. 110. Formerly, each of such companies was governed by the provisions of its own charter or special Act of Parliament; but latterly, general provisions were made for the regulation thereof by the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and (but only as to railways) the Railways Clauses Consolidation Act, 1845 (being respectively the Acts 8 & 9 Vict. cc. 16, 18, and 20); and these three general Acts apply also to all companies established by Act of Parliament after the 8th of May, 1845, for the execution of undertakings of a public nature.

(2.) Companies not excepted from the stat. 7 & 8 Vict. c. 110, and requiring under that statute to be registered. That statute was, however, superseded by the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), which has since been repealed by the Companies Act, 1862 (25 & 26 Vict. c. 89); and this latter statute is now in force. It consolidates the laws relating to joint stock companies, and includes in its operation all companies formed and registered under the Act of 1856 (19 & 20 Vict. c. 47), or under the Act 18 & 19 Vict. c. 133, together with certain companies not formed under the above-mentioned Acts, nor registered (s. 199). And under its provisions, with the exception of companies and partnerships formed under some other Act, or under letters-patent, or engaged in working mines within the jurisdiction of the Stannaries, every banking company or partnership consisting of more than ten persons, and every other company or partnership having for its object the acquisition of gain, and consisting of more than twenty persons, established since the 1st of November, 1862, *mutis*, and any company consisting of seven or more persons associated for any lawful purpose *may*, be formed and registered under the statute. And mining companies in the Stannaries may register under it, and then become subject to its provisions and a peculiar jurisdiction of the Stannaries Court, conferred by the statute. Every other company, too (except a railway company), whether previously existing, or formed afterwards in pursuance of an Act of Parliament or letters-patent, or otherwise duly constituted by law, and every unregistered company consisting of more than seven members, *may*, with the assent of the shareholders, be registered as a

JOINT STOCK COMPANIES—*continued.*

limited or unlimited company under its provisions.

If not thus registered, the law of companies established under private Acts of Parliament, charters, or letters-patent, is that laid down by their Acts, charters, or letters-patent. Companies thus constituted certainly differ very materially from ordinary firms; but, so far as their Acts, charters, or letters-patent have not provided, they are governed by the ordinary law of partnership.

See titles **LIMITED LIABILITY**; **PARTNERSHIP**.

JOINT TENANTS. Those who hold lands or tenements by joint tenancy. It may be further described by the following passage from Cruise:—

"When lands are granted to two or more persons to hold to them and their heirs, or for the term of their lives, or for the term of another's life, without any restrictive, exclusive, or explanatory words, all the persons named in such grant, to whom the lands are so given, take a joint estate, and are thence called joint tenants." 2 Cruise, 431; Litt. s. 277.

See also, title **SURVIVORSHIP**.

JOINTURE. A settlement of lands or tenements made to a woman on account of marriage. It is defined by Lord Coke to be "a competent livelihood of freehold for the wife of lands or tenements, &c., to take effect presently in possession or profit, after the decease of her husband, for the life of the wife at least." The woman on whom such a settlement of lands is made is termed a jointress (1 Cruise, 199; 1 Inst. 35). A legal jointure was first authorized by the Statute of Uses, 27 Hen. 8, c. 10, by which statute if the jointure is before marriage, the woman shall not have her election between jointure and dower, but if the jointure is after marriage, then she shall have her election.

JUDGMENT. Is defined to be the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the suit. Judgment is given either for the plaintiff or the defendant; when for the plaintiff, it is either a judgment (1) by *confession*, or (2) by *default*; when given for the defendant it is either a judgment of (3) *non-suit*, (4) *non pros.*, (5) *retrazit*, (6) *nolle prosequi*, (7) *discontinuance*, or (8) *stet processus*; and judgment may be given for either party upon (9) *demurrer*, (10) *issue of nul tiel record*, or (11) *verdict*. A judgment (1) by confession, or (2) default, is such a judgment as is signed against the defendant when the justice of the plaintiff's

JUDGMENT—*continued.*

claim is admitted by him, either (1) in express terms, as by giving a *cognovit*, or (2) by conduct, as by failing to take proper steps in the suit. A judgment upon (3) *non-suit* is a judgment given to the defendant whenever it clearly appears that the plaintiff has failed to make out his case by evidence. A judgment of (4) *non pros.* is a judgment which the defendant is entitled to have against the plaintiff when he does not follow up (*non prosequitur*) his suit as he ought to do, as by delaying to take any of those steps which he ought to take beyond the time appointed by the practice of the Courts for that purpose. A (5) *retrazit*, or (6) *nolle prosequi*, is when the plaintiff, of his own accord, declines to follow up his action; the difference between them is, that a *retrazit* is a bar to any future action brought for the same cause, whereas a *nolle prosequi* is not, unless made after judgment (*Bowden v. Horn*, 1 Bing. 716). A judgment on a (7) *discontinuance* is when the plaintiff finds that he has misconceived his action and obtains leave from the Court to discontinue it, on which judgment is given against him, and he has to pay the expenses. A judgment on a (8) *stet processus* is entered when it is agreed, by leave of the Court, that all further proceedings shall be stayed; though in form this is a judgment for the defendant, yet it is generally like a discontinuance, being, in point of fact, for the benefit of the plaintiff, and entered on his application; as, for instance, when the defendant has become insolvent, &c. Judgment on (9) *demurrer* is such a judgment as is pronounced by the Court upon a question of law submitted to them, as opposed to a question of fact, which is submitted to a jury. A judgment upon an (10) *issue of nul tiel record* is when a matter of record is pleaded in any action—as a fine, a judgment, or the like—and the opposite party pleads "*nul tiel record*," i.e., that there is no such matter of record existing; upon this issue is joined and tendered in the following form: "And this he prays may be inquired of by the record, and the other doth the like;" and thereupon the party pleading the record has a day given him to bring it in, and proclamation is made in Court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned;" and on his failure to do so his antagonist shall have judgment to recover. A judgment upon (11) a *verdict*, is the judgment of the Court pronounced after the jury have given their verdict. As to interlocutory and final judgments see titles **INTERLOCUTORY**, **FINAL**; and see also next title.

JUDGMENT DEBTS. These are debts,

JUDGMENT DEBTS—continued.

whether on simple contract or by specialty, for the recovery of which judgment has been entered up, either upon a *cognovit*, or as the result of a successful action. The old law of judgments was in many respects different from the present law. Thus, under the old law, which rested substantially upon the Acts 13 Edw. 1, c. 18, 29 Car. 2, c. 3, and 4 & 5 W. & M. c. 20, the lands affected by a judgment were the entirety of terms for years only, and one moiety of freehold lands, tithes, reversions, and trust estates whereof the trustee was seised for the debtor at the time of execution sued. Estates tail were liable to the extent of one moiety thereof, but only during the life of the tenant in tail; and joint tenancies were in the same position. Moreover, trust terms for years, joint trust estates, and equities of redemption were altogether exempt; as were also copyholds, glebe, and advowsons in gross. Moreover, purchasers (including mortgagees) were not bound by a judgment which was either undocketed or misdocketed (*Tunstall v. Trappes*, 3 Sim. 286; *Branding v. Plummer*, 8 De G. M. & G. 747); unless they had notice thereof, in which case they were bound (*Davis v. Strathmore (Earl)*, 16 Ves. 419). However, Equity assisted the judgment-creditor towards enforcing his execution in respect of those equitable interests before enumerated which were not statutorily liable on an *elegit*; thus, in the case of an equitable freehold estate, the judgment-creditor, after suing out an *elegit*, might file his bill in Equity for relief (*Neute v. Marlborough (Duke)*, 3 My. & Cr. 407); and in the case of an equitable leasehold or term of years, the judgment creditor, after suing out a *fi. fa.*, might in like manner file his bill in Equity for relief (*Gore v. Bousser*, 1 Jur. (N.S.), 392); and this seems to be still the law. *Padwick v. Duke of Newcastle*, L. R. 8 Eq. 700.

On the other hand, under the present law, which depends substantially upon the following statutes, namely:—

- 1 & 2 Vict. c. 110,
- 2 & 3 Vict. c. 11,
- 3 & 4 Vict. c. 82,
- 23 & 24 Vict. c. 38, and
- 27 & 28 Vict. c. 112,

the lands affected by a judgment are the entirety of lands, tenements, and hereditaments, whether freehold, copyhold, or leasehold, and whether legal or equitable, and whether possessed at the time of entering up judgment or afterwards, and whether joint or sole, and whether the interest of the debtor therein amount to an estate in, or only to a general power over them. Advowsons are no longer exempt from lia-

JUDGMENT DEBTS—continued.

bility; but with reference to rectories and tithes, only lay and not ecclesiastical ones are intended (*Hawkins v. Gathercole*, 6 De G. M. & G. 1). The judgment prevails against the *jus accrescendi* in the case of joint tenants (1 Dart's V. & P. 431), and also against the issue of tenant in tail, and against remaindermen in tail. *Lewis v. Duncombe* 20 Beav. 398.

The before-mentioned Victorian Statutes also made provision for the registration and re-registration of judgments and executions thereon, the short result of which may be stated as follows:—From the 16th of August, 1838, to the 23rd of July, 1860, every judgment that was entered up against the owner of lands required to be registered in the owner's name (i.e., in the name of the debtor), and to be re-registered every five years, in order to become a charge upon the land; from the 23rd of July, 1860, to the 29th of July, 1864, every like judgment required to be registered in the name of the debtor, and to be re-registered every five years, and execution thereon required also to be sued out, and also registered in the name of the creditor, and also within three months from the date of such registration to have been executed, in order to become a charge upon the land; but since the 29th of July, 1864, no such judgment requires to be registered at all, but execution is to be sued out thereon, and to be also registered in the name of the debtor, although even then it is not a charge upon the land until such land has been actually taken upon the execution by summary process.

The date of the registration, and not that of entering up the judgment, or of the registration, and not that of suing out the execution, is the point of time which regulates the priorities or rights of adverse successive claimants; thus, judgment creditors, as between themselves, take rank according to the order of the dates of their several registrations, and notice of an unregistered judgment entered up at a prior date does not affect them (*Benham v. Keane*, 1 J. & H. 685), as neither does such notice affect a subsequent purchaser or mortgagee, this being the construction of the stats. 3 & 4 Vict. c. 82, s. 2, and 18 & 19 Vict. c. 15, s. 5. But notice of an unregistered judgment does affect a subsequent *cestui que trust* (*Benham v. Keane, supra*). And notice of a judgment which has been re-registered within five years prior to the date of the purchase or mortgage does affect a purchaser or mortgagee having notice thereof, notwithstanding an interval of more than five years may have elapsed between such re-registration and the next preceding registration (*Simpson*

JUDGMENT DEBTS—continued.

v. Morley, 2 K. & J. 71); but a purchaser or mortgagee who has no notice of a judgment, although the same has been registered, and, *à fortiori*, as already mentioned, if it is either unregistered or not duly re-registered, is not bound thereby, this being the construction of the stat. 2 & 3 Vict. c. 11, s. 5, for it has been held that registration is not notice (*Robinson v. Woodward*, 4 De G. & Sm. 562), unless, indeed, it can be proved that the party has made an actual search over the period covering the judgment (*Proctor v. Cooper*, 2 Drew. 1); and no such search is compulsory either upon a purchaser or upon a mortgagee (*Lane v. Jackson*, 20 Beav. 535), although it is not, therefore, wise to avoid a search (*Freer v. Hesse*, 4 De G. M. & G. 495). And in case the property is situate in a register county, the registration and re-registration must be made both in the local and in the general registries. *Johnson v. Houldenworth*, 1 Sim. N.B. 106; *Benham v. Keane*, *supra*.

In the case of a judgment which is entered up between a contract for sale and the conveyance of the land, where the judgment is duly perfected as required by the Acts, the judgment creditor could not, by the old law, proceed against the land in the hands of the purchaser (*Lodge v. Lyseley*, 4 Sim. 70), but would have been restrained by injunction from so doing (*Brunton v. Neale*, 14 L. J. (Ch.) 8); the judgment creditor might, however, have come against the unpaid purchase-money (*Forth v. Norfolk (Duke)*, 4 Madd. 505); and the present law is to the same effect (*Brown v. Perrott*, 4 Beav. 585). And by the present law, upon any sale by a mortgagee, the surplus proceeds of sale are charged by any judgments entered up against the mortgagor between the dates of the mortgage and the sale (*Robinson v. Hedger*, 13 Jur. 846). But under the old law and under the present law a judgment entered up subsequently to a voluntary conveyance, and duly perfected, does not upset the prior voluntary conveyance (*Beavan v. Oxford (Earl)*, 6 De G. M. & G. 507), a judgment creditor not being a purchaser within the meaning of the stat. 27 Eliz. c. 4.

A judgment entered up against an annuitant has been held to be a charge on the land out of which the annuity issues (*Younghusband v. Gisborne*, 1 De G. & Sm. 209); and the like decision was given regarding a judgment entered up against one entitled to a gross sum of money charged on land (*Russell v. McCulloch*, 1 K. & J. 318); but now, by the stat. 18 & 19 Vict. c. 15, s. 11, where a mortgage is paid off prior to the completion of the purchase, any judgment against the mort-

JUDGMENT DEBTS—continued.

gagee ceases to be a charge on the lands purchased. *Groaves v. Wilson*, 25 Beav. 434.

The extent of the judgment creditor's remedy at Law depends on the 11th section of the 1 & 2 Vict. c. 110, and the extent of his remedy in Equity on the 13th section of that Act. And, accordingly, at Law the judgment creditor may proceed against all legal estates of his debtor, and also against all estates held simply in trust for him, but not against any equity of redemption of his debtor; and in Equity he may proceed against all and every the lands of his debtor, having first taken out an *elegit* (*Smith v. Hurst*, 10 Hare, 80), and obtained actual possession of the lands, if possible, or the nearest equivalent to actual possession (*Guest v. Cowbridge Ry. Co.*, L. R. 6 Eq. 619), and he should pray a sale of the lands (as distinguished from a foreclosure) (*Tuckley v. Thompson*, 1 J. & H. 126), an order for which he may obtain upon petition in a summary way under the 27 & 28 Vict. c. 112 (*Re Isle of Wight Ferry*, 11 Jur. (N.S.) 279). Sometimes both a bill and a petition may, however, be necessary (*Re Cowbridge Ry. Co.*, L. R. 5 Eq. 413). If neither an *elegit* nor a *fi. fa.* can be sued out there is no remedy. *Padwick v. Newcastle (Duke)*, L. R. 8 Eq. 700.

JUDGMENT ROLL. A parchment roll upon which all proceedings in the cause up to the issue, and the award of *venire* inclusive, together with the judgment which the Court has awarded in the cause are entered. This roll, when thus made up, is deposited in the treasury of the Court, in order that it may be kept with safety and integrity. In practice, the making up and depositing the judgment roll is generally neglected, unless in cases where it becomes absolutely necessary to do so; as when, for instance, it is required to give the proceedings in the cause in evidence in some other action; for in such case the judgment-roll, or an examined copy thereof, is the only evidence of them that will be admitted. *Smith's Action at Law*, 184.

JUDICIAL WRITS. Such writs as issue under the private seal of the Courts, and not under the great seal of England, and are tested or witnessed not in the king's name, but in the name of the chief judge of the Court out of which they issue, are so called. The word "judicial" is used in contradistinction to original; original writs signifying such as issue out of Chancery under the great seal, and are witnessed in the king's name. Since the Uniformity of Process Act (2 Will. 4, c. 89, s. 31), the distinction has become almost useless.

JUGES D'INSTRUCTION. In French Law, are officers subject to the *Procureur-Imperial* (see that title), who receive in cases of criminal offences the complaints of the parties injured, and who summon and examine witnesses upon oath, and after communication with the *procureur-imperial* draw up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are appointed for three years, but are re-eligible for a further period of office. They are usually chosen from among the regular judges.

JURAT (from the Lat. *juratus*, sworn by). The clause written at the foot of an affidavit, stating when, where, and before whom such affidavit was sworn, is called the jurat.

JURISDICTION (*jurisdictio*). The right-power, or authority which an individual or a Court has to administer justice. Thus the three superior Courts of Common Law—viz., the King's Bench, Common Pleas, and Exchequer, have jurisdiction over all personal actions throughout England; that is, they have power and authority to hear and determine such actions throughout England.

JURIS UTEUM. A writ that lay for the succeeding incumbent of a benefice, to recover the lands or tenements belonging to the church, which had been aliened by his predecessor. *Les Termes de la Ley*.

JURORS, IMMUNITY OF. In early times juries were subject to punishment and intimidation for giving and in giving certain verdicts, the chief processes against them being two, namely:—

- (1.) By writ of attain; and
- (2.) By summary fine and imprisonment.

First. Attain was a process which lay partly by the Common Law and partly by statute. The proceeding consisted in impanelling a jury of twenty-four to try the verdict of the twelve. The verdict of the twenty-four was final, and if opposed to that of the twelve, it operated the two following effects, namely:—

- (1.) It annulled the former verdict; and
- (2.) It convicted the twelve of perjury and false verdict.

Thereupon, the convicted jurors were arrested and imprisoned and rendered infamous for ever; their lands and goods were forfeited to the king, their wives and children were turned out of their homes, their houses were thrown down, their trees were rooted up, and their meadows were ploughed. This proceeding was available only in the case of a verdict in civil causes.

Secondly, the summary process by fine and imprisonment, although it was frequently resorted to, was admitted to be illegal, as being against Magna Charta.

JURORS, IMMUNITY OF—continued.

The Star Chamber was the Court by which chiefly this summary jurisdiction was exercised; and although in certain cases there may have been good cause for the Star Chamber to intervene (it is alleged, e.g., in the case of Welsh juries), still the jurisdiction and the exercise of it were alike inexcusable. After the abolition of the Star Chamber in 1641, the practice of fining and imprisoning jurors for giving false verdicts was not altogether discontinued; for in 22 Car. 2, it was again resorted to in the case of Bushell, who was one of the jury who had (notoriously against the truth) found that Penn and Mead had not preached in Gracechurch Street, contrary to the Act of Uniformity, the Five Mile Act, or the Conventicle Act. This man Bushell, having been imprisoned along with his fellow jurors upon the late trial, sued out his writ of habeas corpus; and the cause of his imprisonment being stated in the return made to his writ to be that he had found a verdict in favour of Penn and Mead, *contrary to the evidence* and also *contrary to the direction of the judge in matter of law*, after argument upon the sufficiency or legality of that cause of imprisonment, Vaughan, C.J., ordered Bushell to be released, holding in effect, therefore, that jurors could not be fined or imprisoned for an alleged false verdict, and basing that opinion upon the following grounds,—

(1.) That the jury were the judges of the evidence and found the same, and their finding was the only evidence, no matter what the alleged evidence adduced might be; and

(2.) That the judge's direction, even in matter of law, was not imperative or absolute, but was hypothetical merely, for he could not direct what the law was without first knowing the fact, and the jury had not as yet found the fact at the time he gave his direction.

This sophism of the chief justice, which even a regard for liberty can scarcely palliate, was effectual in causing the abandonment of the summary procedure against jurors for the future. The other and regular proceeding, that by attain, fell gradually into disuse by reason of the extreme severity of its consequences, and it was eventually abolished altogether by the County Juries Act, 1825 (6 Geo. 4, c. 50), which substituted a motion for a new trial as the mode, and that is at the present day the only mode, of impugning or, at any rate, reviewing the verdict of a jury. This mode is available, moreover, in civil cases only.

JURY (*jurata*, from *jurare*, to swear),

JURY—*continued.*

A certain number of men (usually twelve) to whose decision the matter in dispute between a plaintiff and defendant is submitted, and who are bound upon their oaths to decide (or give their verdict) according to the evidence which is laid before them on the trial of the cause. Such men, individually, are called jurors. A jury is either a common jury or a special jury. A common jury consists of persons between the ages of twenty-one and sixty, who shall have £10 a year, beyond reprises, in lands and tenements of freehold, copyhold, or customary tenure, or held in ancient demesne, or in rents issuing out of such tenements, in fee simple, fee tail, or for life, or £20 a year in leaseholds held for twenty-one years or any longer term, or any term determinable on a life or lives: of, being a householder, shall be rated to the poor rate, or in Middlesex to the house duty, in a value of not less than £30; or who shall occupy a house containing not less than fifteen windows. These qualifications, however, do not extend to jurors of any liberties, franchises, cities, or boroughs who possess civil or criminal jurisdiction. It is called a common jury, because the matter to be tried by it is only of a common or ordinary nature. A special jury consists of persons of the degree of squire or upwards, or of the quality of banker, or merchant, &c. It is called special, because the matter to be tried by it is usually of a special and important nature, and is supposed to require men of education and intelligence to understand it. See also Jury Act, 1870, 33 & 34 Vict. c. 77.

JURY, TRIAL BY. It is a disputed point whether trial by jury existed in Anglo-Saxon times, but the following may be considered as traces of that mode of trial in those times in its rudest aspect;—

(1.) A law of Alfred, requiring a king's thane accused of homicide to purge himself of the charge with twelve king's thanes, and a lesser thane under like accusation to purge himself with eleven of his equals and one king's thane;

(2.) One of the canons of the Northumbrian clergy, requiring a king's thane to purge himself before twelve king's thanes of his own choice, twelve others appointed for him, and twelve British strangers, being thirty-six men altogether, with similar provisions for lesser thanes and ceorls;

(3.) A law of Ethelred II., whereby the sheriff and twelve thanes in every wapentake were constituted a tribunal of justice; and

(4.) The case of the monastery of Ramsey, in which a controversy between the monastery and a certain private individual

JURY, TRIAL BY—*continued.*

having arisen regarding certain lands, and a suit having been instituted about it in the County Court, the matter was referred to a committee of thirty-six thanes for its determination.

Now, it may be said that these bodies were not jurors, but compurgators; but to this it is replied that compurgation was, in Anglo-Saxon times (as in all early ages), a natural mode of evidence, being the oath or oaths of the collective bodies to the effect that they disbelieved the truth of the accusation (*see* title **COMPURGATION**), and it being, moreover, a more peculiar characteristic of the Anglo-Saxons that they gave great weight to credit or general character,—a species of evidence but little regarded in civilised times, *e.g.*, in the present day. *See* title **CHARACTER, EVIDENCE AS TO**.

This rude mode of taking evidence having been discontinued in Anglo-Norman times, there was introduced in those later times, in lieu of compurgation, an *inquest*, or inquisition, *i.e.*, inquiry into the particular circumstances or the details of the case, but evidence of character was not even then (as it is not even yet) altogether laid aside.

This inquest was made by sworn *recognitors*, being twelve or twenty-four in number, as well in civil as in criminal proceedings. In the reign of Henry II., the assize of *novel disseisin*, called also the *magna assize*, or *grand assize*, was introduced, whereby, in a civil suit, the plaintiff or defendant had his choice either to try the dispute by *combat*, or to put himself on this assize, which was composed of sixteen sworn recognitors and in the same reign the ancient privilege of compurgation, pure and simple, was abolished.

In the reign of Henry III. trial by ordeal was abolished, and trial by a petty jury in criminal causes was introduced; and with that reign trial by jury, both in civil and in criminal matters, may be regarded as having been for the first time completely established, subject, however, to the following qualification, namely,—

The jurymen were originally themselves the witnesses, and their verdict or finding was the result of their own knowledge, unassisted by other testimony; but it was impossible that twelve men should always be acquainted with the circumstances of the matter before them, and the distinction of jurors from witnesses was early felt to be a necessity, and the distinction itself was, in fact, made at some early but unassignable date. It is probable that as the law of evidence became gradually better understood, and the weakness of character-evidence became gradually more apparent,

JURY, TRIAL BY—*continued.*

so the distinction referred to became gradually more and more perceived to be necessary and to be taken, until, at the present day, the distinction is become marked and essential. And yet, even at the present day, the jury may assist themselves by their own knowledge as well as by the testimony of the witnesses.

JUS. Right, law, authority, &c.
See the following titles.

JUS ACCRESCENDI is used by our old law writers to signify the right of survivorship amongst joint tenants, &c.
See title **SURVIVORSHIP**.

JUS AD REM signifies the inchoate or imperfect right to a thing, in contradistinction to *ius in re*, which signifies the complete and perfect right in the thing.

JUS DUPLICATUM, or DROIT DROIT, signifies the right of possession joined with the right of property.

JUS IN RE: *See* title **JUS AD REM**.

JUS POSTLIMINII is a right to restitution after a re-capture as applied in maritime law,—a use of the phrase which is derived from the Roman *ius postliminii*, which restored the citizen of Rome who had been made a slave to his threshold, i.e., to his franchise. The term is therefore metaphorically used in our Admiralty Courts to signify a resumption of an original inherent right to a re-captured British ship in the legal owners. But the phrase is also frequently used with an analogous meaning in other branches of the law.

JUS RECUPERANDI, INTRANDI, &c. is the right of recovering and entering lands. Tomlins; Cowel.

JUS TERTII. This phrase, which signifies literally the right of some third person, is commonly applied in the following manner: a tenant, it is true, cannot dispute the title of his landlord, but he may plead that such title has determined by conveyance or otherwise; and so also a bailee when sued to re-deliver the goods bailed to him, cannot as a rule deny the right of the bailor (who delivered them to him) to recover the goods; nevertheless he may shew that by transfer, assignment, or otherwise, the bailor's right to have the goods re-delivered to him has determined, e.g., a pawnbroker will regard only the holder of the duplicate, and to an action brought by the pawnor, will set up the defence of *ius tertii*.

JUSTICES (*justiciarii*). Officers appointed by the Crown to administer justice.

JUSTICES—*continued.*

The various sorts of justices will be found under their proper heads in the following titles.

JUSTICES OF ASSIZE, or, as they are sometimes called, justices of *nisi prius*. The judges of the superior Courts at Westminster, who go circuit into the various counties of England and Wales twice a year, for the purpose of disposing of such causes as are ready for trial at the assizes, are termed justices of assize.

See also title **CIRCUITS**.

JUSTICES IN EYRE. So called from the old French word *eyre*, i.e., a journey, were those justices who in ancient times were sent by commission into various counties to hear more especially such causes as were termed pleas of the Crown; they differed from justices in *oyer and terminer*, inasmuch as the latter were sent to one place, and for the purpose of trying only a limited number of special causes; whereas the justices in eyre were sent through the various counties with a more indefinite and general commission; in some respects they resembled our present justices of assize, although their authority and manner of proceeding differed much from them.

JUSTICES OF THE FOREST were officers who had jurisdiction over all offences committed within the forest against vert or venison. The Court wherein these justices sat and determined such causes was called the justice seat of the forest. They were also sometimes called the justices in eyre of the forest.

JUSTICES OF GAOL DELIVERY. Those justices who are sent with commission to hear and determine all causes appertaining to such persons who for any offence have been cast into gaol. Part of their authority was to punish those who let to mainprise those prisoners who were not bailable by the law, nor by the Statute *De finibus*; and they seem formerly to have been sent into the country upon this exclusive occasion, but afterwards justices of assize had the same authority given them.

JUSTICES OF THE HUNDRED. A hundredor, lord of the hundred, he who had the jurisdiction of a hundred, and held the Hundred Court.

JUSTICES OF THE JEWS. Justices appointed by Richard I. to carry into effect the laws and orders which he had made for regulating the contracts and usury of the Jews.

JUSTICES OF LABOURERS. Justices who were formerly appointed to redress the

JUSTICES OF LABOURERS—continued.

frowardness of labouring men, who would not work without having unreasonable wages granted them.

JUSTICES OF NISI PRIUS: See title JUSTICES OF ASSIZE.

JUSTICES OF OYER AND TERMINER.

These justices of *oyer* and *terminer* are certain persons appointed by the king's commission, among whom are usually two judges of the Courts at Westminster, and who go twice in every year into every county of the kingdom (except London and Middlesex), and at what is usually called the assizes hear and determine all treasons, felonies, and misdemeanors. They are usually those who have before been described under the titles of Justices of Assize, and Justices of Gaol Delivery.

JUSTICES OF THE PEACE. Certain justices appointed by the king's special commission under the great seal jointly and separately, to keep the peace of the country where they dwell. Any two or more of them are empowered by this commission to inquire of and determine felonies and other misdemeanors, in which number some particular justices, or one of them, are directed to be always included. and no business to be done without their presence, the words of the commission running thus: "*quorum aliquem vestrum*," A. B. C. D., &c., "*unum esse volumus*;" whence the persons so named are usually called justices of the quorum.

JUSTICES OF THE PEACE, ORIGIN OF.

The origin of these magistrates is to be found in the reign of Edward I., who by the stat. 3 Edw. 1 (Statute of Westminster the First) c. 9, and by the statute of Coroners (4 Edw. 1, stat. 2), but chiefly by the statute of Winton, otherwise Winchester (13 Edw. 1), directed that every country and town should be well kept, and that upon any robbery or felony committed therein, *hue and cry* should be raised upon the felon, and they that kept the town were to follow him with hue and cry from town to town with all the town and the towns near; and failing capture, the hundred was made liable for the damage. In the reign of Edward III., conservators of the peace were appointed, whose duty it was to assist the sheriff, coroner, and constable, and they were empowered to imprison and punish rioters and offenders. These conservators were afterwards designated justices of the peace. By a more recent statute, 27 Eliz. c. 13, the sheriff or constable was required to make the pursuit both with horse and foot; and to the present day, hue and cry in that manner may still be made under that and the

JUSTICES OF THE PEACE, ORIGIN OF—continued.

previous statutes, but is seldom if ever in fact made, owing to the equally effective, if not so speedy, remedy which is provided in the ordinary police and criminal processes for the apprehension and punishment of offenders.

JUSTICES. A writ directed to the sheriff, empowering him for the sake of dispatch to try an action in his County Court for a larger amount than he has the ordinary power to do. It is so called because it is a commission to the sheriff to do the party justice. 4 Inst. 266.

JUSTIFICATION. Pleas in justification or excuse are such as shew some justification or excuse of the matter charged in the declaration, the effect of which is to shew that the plaintiff never had any right of action because the act charged was lawful; a plea of *son assault demesne* is one of this kind of pleas (Stephen on Plead. 224). They are, however, more common in actions for a libel, to which the defendant justifies on the score either of privilege, or of truth and the public advantage.

JUSTIFYING BAIL. Is the act of proving to the satisfaction of the Court that the persons put in as bail for the defendant in an action are competent and sufficient persons for the purpose. No persons are justified in becoming bail for a defendant unless they are householders and possess certain other qualifications with reference to property, &c.; but it frequently happens that persons become, or endeavour to become, bail for a defendant, who are not so qualified, or whom the plaintiff suspects not to be so qualified: in this case the plaintiff objects to such bail (or, as it is termed, excepts to them), who are then called on to justify themselves, and this they do by swearing themselves to be housekeepers, and to possess the other qualifications required of them; and this is termed justifying bail. They frequently justify voluntarily, without being required to do so by the plaintiff. 1 Arch. Prac. 847-57; Tidd. 149.

JUVENILE OFFENDERS: See title REFORMATORIES.

K.

KEEPER OF THE GREAT SEAL. A high officer of state, through whose hands pass all charters, grants, and commissions of the king under the great seal. He is styled Lord Keeper of the Great Seal, and this office and that of Lord Chancellor are united under one person; for the authority

KEEPER OF THE GREAT SEAL—cont.

of the Lord Keeper and that of the Lord Chancellor were, by stat. 5 Eliz. c. 18, declared to be exactly the same; and like the Lord Chancellor, the Lord Keeper with us at the present day is created by the mere delivery of the king's great seal into his custody. Comyns' Dig. tit. Chancery.

KEEPER OF THE PRIVY SEAL.

An officer through whose hands pass all charters signed by the king before they come to the great seal. He is a privy councillor, and was anciently called clerk of the privy seal, but is now generally called the Lord Privy Seal. Rot. Parl. 11 H. 4.

KING'S BENCH. The supreme Court of Common Law in the kingdom, consisting of a chief justice and four puisné justices, who, by their office, are the sovereign conservators of the peace and supreme coroners of the land. The Court of King's Bench was so called because the king used formerly to sit there in person, the style of the Court still being *coram ipso rege*. This Court is the remnant of the *Aula Regis*, and was formerly not stationary in any particular spot, but attended the king's person wherever he went; hence the reason for process issuing out of this Court in the king's name being returnable, "*ubicunque fuerimus in Angliâ*." 4 Inst. 13.

See also title COURTS OF JUSTICE.

KING'S COUNSEL. Barristers selected on account of their superior learning and talent to be his majesty's counsel; the only outward distinction between these and other barristers is, that they wear silk gowns and take precedence in Court. The two principal of the king's counsel are called the Attorney and Solicitor-General, and none of these counsel can plead publicly in Court for a prisoner or a defendant in a criminal prosecution without a licence obtained for that purpose from the Crown. Fortescue, *de Legibus*, c. 50.

KNIGHT'S FEE (*feodum militare*): See title KNIGHT SERVICE.

KNIGHT SERVICE. A species of feudal tenure, which differed very slightly from a pure and perfect feud, being entirely of a military nature; and it was the first, most universal, and most honourable of the feudal tenures. To make a tenure by knight service, a determinate quantity of land was necessary, which was called a knight's fee (*feodum militare*), the measure of which was estimated at twelve plough-lands. Spelman, 219; 2 Inst. 596.

KNIGHTS OF THE SHIRE. Knights

KNIGHTS OF THE SHIRE—continued.

of the shire, otherwise called knights of Parliament, are two knights or gentlemen of property who are elected by the freeholders of a county to represent them in Parliament. In times of old they were required to be real knights, girt with the sword, but now notable esquires may be chosen. They required to possess, as a qualification to be chosen, not less than £600 per annum of freehold estate. But, at the present day, all property qualifications in members of Parliament have been removed.

See title PARLIAMENT.

L.

LACHES (from the Fr. *lâchesse*, indolence). Negligence, mistake arising from negligence, &c. Thus, in Littleton, "laches of entry," signifies a neglect in the heir to enter (Litt. 136; *Les Termes de la Ley*). *Laches* is a ground for refusing relief in Courts of Equity, upon the maxim of these Courts, "*Vigilantibus non dormientibus æquitas subvenit*"; and so strong is the aversion to bringing forward stale demands, that the Courts of Equity, at any rate in the matters which are subject to their exclusive jurisdiction, refuse to relieve even within the statutory periods of limitation; although, of course, in matters which are subject to their concurrent jurisdiction, they must allow the plaintiff his full legal period.

LESE MAJESTY. An old term of law, designating the crime of attempting anything against the king's life, or to raise sedition against him, or to create disaffection in the army (see 2 Reeve's Eng. Law, 5, 6). The modern equivalent is HIGH TREASON, which title see.

LESIONE FIDEI, SUITS PRO. Suits or actions for breach of faith in civil contracts, which the clergy, in the reign of Stephen, introduced into the spiritual Courts, were so termed. By means of these suits they took cognizance of many matters of contract which in strictness belonged to the temporal Courts. It is conjectured that the pretence on which they founded this claim to an extended jurisdiction was, that oaths and faith solemnly plighted, being of a religious nature, the breach of them belonged more properly to the spiritual than to the lay tribunal (1 Reeves, 74). These suits, along with the jurisdiction assumed over express and implied or resulting uses, open or secret, have contributed to the development of the principal branches of equitable jurisdiction at the present day.

LAND (*terra*). This word has a more comprehensive signification in law than in common parlance; for it comprehends not only land or ground, but also anything that may stand thereon, as a house, a castle, or a barn. It has also an indefinite extent upwards as well as downwards, "*Cujus est solum ejus est usque ad cælum, et deinde usque ad inferos*," being the maxim of the law; and therefore no man may erect any building or the like to overhang another's lands, and whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface, so that the word "lands" comprehends not only the face of the earth, but everything under it or over it (Co. Litt. 4 a). When, however, the word "land" was used in a declaration of ejectment without any qualifying adjunct, it obtained a very restricted sense, and meant arable land (Salk. 256). In such cases, therefore, the particular kind of land should have been stated. Cowp. 346; 11 Rep. 55; Adam's Eject. 31; 2 Ch. Pl. 626, n. (o), 6th ed.

LANDLORD. He of whom lands or tenements are held (Co. Litt.) When the absolute property in, or fee-simple of, the land belongs to a landlord he is then sometimes denominated the ground landlord in contradistinction to such an one as is possessed only of a limited or particular interest in land, and who himself holds under a superior landlord.

LANDLORD AND TENANT. This phrase expresses a familiar legal relation, involving many peculiar rights, duties, and liabilities. The relation is contractual, and is constituted by a letting or agreement to let (as to which, see title LEASE). The landlord is entitled to be paid a stated rent, and may enforce payment thereof either by action, or by distress, or by entry (see these three several titles). The tenant is entitled to the possession and quiet enjoyment of the premises so long as he pays his rent and duly observes and performs the other stipulations contained in his contract (see title COVENANTS). A failure in the performance of any covenant works a forfeiture (see that title), unless the landlord chooses to waive the breach (see title WAIVER). The tenant is also bound to keep and leave the premises in good repair, and will be liable for Dilapidations (see that title); but he is permitted during the term of his lease, but not afterwards, to unfasten and remove all tenants' fixtures so-called which have been affixed to the premises by himself (see title FIXTURES). He is estopped from disputing his landlord's title (see title ESTOPPEL),

LANDLORD AND TENANT—continued. but he may shew that that title has determined (see title JUS TERTII).

See also title EJECTMENT.

LAND-TAX. An annual charge levied by the Government upon the subjects of this realm in respect of their real estates, and also in respect of offices and pensions, but not (since 4 & 5 Will. 4, c. 11) in respect of their personal estates. The method of raising it is by charging a particular sum upon each county according to a certain valuation, and this sum used to be assessed and raised upon individuals by commissioners duly appointed for that purpose (2 Burn's Justice, 61). Under the stat. 16 & 17 Vict. c. 74, facilities are afforded for the redemption of this tax, which is now generally redeemed.

For origin, see title TAXATION.

LAPSE. This word is used in various senses. (1.) As applied to church livings, it denotes a species of forfeiture by which the right of presentation to a church accrues to the ordinary by the neglect of a patron to present; to the metropolitan by the neglect of the ordinary; and to the king by neglect of the metropolitan. (2.) As applied to a legacy, it denotes the failure of a testamentary gift through the devisee or legatee dying in the testator's lifetime. The mere addition of the words "heirs and assigns," or "executors, administrators, and assigns," or other words of limitation to the name of the predeceasing devisee or legatee in the gift to him will not prevent a lapse of the interest given; and the rule is the same where the devisee or legatee is already dead at the date of the will (*Maybank v. Brooks*, 1 Bro. C. C. 84). And although the legacy be of a debt, it is liable to lapse in the same manner (*Elliott v. Davenport*, 1 P. Wms. 83); and although the legacy or devise be contained in a will made in exercise of a power the creation of which was by an instrument (whether deed or will) taking effect before the death of the legatee or devisee, still even in this case the legacy or devise will lapse in case the legatee or devisee predeceases the testator who exercises the power. *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 78; *Culsha v. Cheese*, 7 Hare, 236.

A mere declaration that the devise or bequest shall not lapse is ineffectual to prevent a lapse in case of the devisee or legatee predeceasing the testator (*Pickering v. Stamford*, 3 Ves. 493); but such a declaration, if accompanied with the designation of a substitute for the devisee or legatee in case he predeceases the testator, would be valid to prevent a lapse (*Toplis v. Baker*, 2 Cox, 121); and from the desire

LAPSE—continued.

of the Courts to effectuate the intentions of testators, such designation of a substitute, where not expressly made, has been in a manner implied from trifling circumstances, e.g., in *Gittings v. M'Dermott* (2 My. & K. 69), Lord Brougham, C., in the case of a gift to the children of A. or to their heirs, held that the representatives of predeceasing children were entitled by way of substitution for their parents, the word *heirs*, although ordinarily a word of limitation, and not of purchase, being in that particular decision, and by reason chiefly of the two words or to which are italicised, construed as a word of purchase and not of limitation.

Again, if the testator makes a gift to two or more persons jointly, there is, of course, no lapse if one or more of the joint tenants survive, as the survivors will take by survivorship; and similarly, if the testator makes a gift to two or more persons in common, and limits over to the survivor or survivors the share of any predeceasing tenant, there is, of course, again no lapse if one or more of the tenants in common survive, as the survivor will take under the limitation over. But it is the rule of law in this latter case that there is no survivorship upon survivorship; and therefore, unless the limitation over is made (as it commonly is made) to extend "as well to the accruing as to the original shares," there will be a lapse as to any accrued share of a predeceasing legatee or devisee. *Pain v. Benson*, 3 Atk. 80.

Again, if a devise or bequest is made to persons of a class in common tenancy, and the class is to be, i.e., can only be, ascertained at the date of the testator's death, the members of the class who are surviving at that date will take the whole among them, notwithstanding that other persons who but for their prior death would have formed members of the class may have predeceased the testator. *Viner v. Francis*, 2 Bro. C. C. 658.

And with reference to the question, whether lapse shall take place or not, the cases of *Wilking v. Baine* (3 P. Wms. 113), and *Humberstone v. Stanton* (1 V. & B. 385), should be contrasted.

Where a devise or bequest is made to one person in trust for another, the legal estate will lapse in case the devisee or legatee in trust, i.e., the trustee, should predecease the testator, but the beneficial interest, or interest of the *cestui que trust*, will not therefore also lapse (*Elliott v. Davenport*, 2 Vern. 520); and conversely, in the case of a like devise or bequest, the beneficial estate will lapse, and the legal estate will not lapse in case the *cestui que trust* predecease the testator (*Doe d. Shelley*

LAPSE—continued.

v. Edlin, 4 Ad. & E. 582). It has even been held in *Oke v. Heath* (1 Ves. 135) that an annuity bequeathed to C. and charged on a bequest to B. did not lapse by reason merely that B. predeceased the testator, whereby the bequest to him lapsed.

Some provisions have been made by the stat. 7 Will. 4 & 1 Vict. c. 26, against lapse in certain cases, that is to say:

(1.) By s. 25 of that Act devises and bequests which would otherwise lapse are given to the residuary devisee or legatee (if there is one);

(2.) By s. 32 of the same Act the devise of an estate tail to any one (whether child or stranger) does not lapse by reason merely of the devisee in tail predeceasing the testator, but takes effect in him, and descends to the person who is his heir in tail at the testator's death, if he has any such; and

(3.) By s. 33 devises or bequests made to a child or children of the testator who predecease the testator, but leave issue surviving the testator, do not lapse, but take effect in the predeceasing child or children, and devolve in case of the intestacy of the latter upon their next of kin, and in case they have made a will, according to the disposition or dispositions thereof contained in that will (*Winter v. Winter*, 5 Hare, 306; *Johnson v. Johnson*, 3 Hare, 157). It has been held, however, that the 33rd section of the Act does not apply to gifts under a *limited*, i.e., *special*, power of appointment, where there is a gift over in default of appointment (*Griffiths v. Gale*, 12 Sim. 327); but it does apply to a *general* power of appointment, even although there is a gift over in default of appointment. *Eccles v. Cheyne*, 2 K. & J. 676.

LARCENY. Larceny is the felonious taking and carrying away of the personal goods of any one from his possession, with intent to convert them to the use of the offender without the consent of the true owner. Larceny was formerly divided into grand and petty larceny; the former, including the stealing of goods above the value of 12d.; the latter of that value or under. This distinction was abolished by stat. 7 & 8 Geo. 4, c. 29, and now all larcenies are subject to the same incidents as grand larceny. Larceny is sometimes distinguished into simple and compound; the former being larceny of goods only, the latter larceny from the person or habitation of the owner (1 Hale, 510). The law regarding this offence is now consolidated by the statute 24 & 25 Vict. c. 96, which renders also many things (both animate and inanimate), the subjects of larceny,

LARCENY—continued.

which for various reasons were not so before that Act.

LATENT AMBIGUITY. This is an ambiguity which arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe. The term is opposed to the phrase Patent Ambiguity (which see). The rule of law is, that extrinsic or parol evidence is admissible in all cases to remove a latent ambiguity, but in no case to remove a patent one.

See title EXTRINSIC EVIDENCE.

LATHE, LATH, or LETH. Is the designation of a great portion of a county containing three or more hundreds or wapentakes. *Les Termes de la Ley.*

LATITAT. A writ, which before the Uniformity of Process Act, was the process used for commencing personal actions in the King's Bench against a defendant seeking to evade the service of the writ. It recited the bill of Middlesex, and the proceedings thereon, and that it was testified that the defendant "*latitat et discurre*," lurks and wanders about, and therefore commanded the sheriff to take him, and have his body in Court on the day of the return.

See now titles SERVICE; SUBSTITUTED SERVICE.

LAW. This word has various significations. (1.) In the most enlarged sense in which the word can be used, it applies not only to those rules, or systems of rules, which different governments lay down for the internal regulation of their respective communities, but also to those fixed and invariable principles in conformity with which nature carries on her operations. (2.) When, however, we wish to restrict the sense, or to limit the application of the word, we use it ordinarily in conjunction with some other phrase; thus, when we apply it to those rules or principles of morality which our reason enables us to discover, and our conscience commands us to obey, we call it not unfrequently the law of nature; and when the same rules and principles are applied to the regulation of the conduct of nations in their intercourse with each other, it is then termed the Law of Nations or International Law. (3.) The word "*Law*," however, in a still more limited sense, signifies that body, or system, of rules, which the government of a country has established for its internal regulation, and for ascertaining and defining the rights and duties of the governed, and it is then commonly called Municipal, *i.e.*, Civil Law, and, in popular language,

LAW—continued.

"the law of the land." The Municipal Law of England is composed of written and unwritten laws (*jus scriptum* and *jus non scriptum*); or, in other words, of the statutes of the realm, and of the custom of the realm, otherwise termed the "Common Law;" on both of which branches of the law the superior Courts exercise their judgment, giving construction and effect to the former, and by their interpretation declaring what is and what is not the latter. The following extract from an important case furnishes a good illustration of the division of our Municipal Law into the *jus non scriptum*, or the Common Law, and the *jus scriptum* or the written, or Statute Law, and of the mode in which the Courts exercise their judgment thereon:—

"Two questions of importance were raised in the course of the argument. The first, is, whether at Common Law a foreigner residing abroad, and composing a work, has a copyright in England. The second is, whether such foreign author, or his assignee, has such a right by virtue of the English statutes. . . . We are all of opinion that no such right exists in a foreigner at the Common Law; but that it is the creature of the Municipal Law of each country, and that in England it is altogether governed by the statutes which have been passed to create and regulate it. A foreign author having, therefore, by the Common Law, no exclusive right in this country, the only remaining question is, whether he has such a right by the Statute Law; and this depends on the construction of the statutes relating to literary copyright which were in force at the time of the transaction in question." See *per* Pollock, C.B., in *Chappel v. Purday*, 14 M. & W. 316; also 1 Reeve's Hist. 1.) For an explanation of the different kinds of law, see their particular titles.

The various significations in which the term "*Law*" has been used in jurisprudence, are thus given by Locke and Austin:

I. Locke's divisions of Laws,—

- (1.) Divine Law,—being the Law of God natural and revealed;
- (2.) Civil Law,—being the Municipal Law; and
- (3.) Law of Reputation, being morality.

II. Austin's divisions of Laws,—

- (1.) Divine Law,—being the revealed Law of God;
- (2.) Positive Human Law, being Municipal Law;
- (3.) Positive Morality, being morality; and
- (4.) Laws metaphorically so called, being the laws of animate and inanimate nature.

LAW OF MARQUE (from the German word *marck*, i.e., a bound or limit). A sort of law of reprisal, which entitles him who has received any wrong from another, and cannot get ordinary justice, to take the shipping or goods of the wrongdoer when he can find them within his own bounds or precincts, in satisfaction of the wrong (Cowel). The consent of the sovereign is necessary before any subject can thus proceed by his own arm to vindicate a wrong; and such consent, where granted, is expressed in the so-called *Letters of Marque*.

See also title REPRISALS.

LAW MERCHANT (*lex mercatoria*). One of the branches of the unwritten or Common Law, consists of particular customs, or laws which affect only the inhabitants of particular districts, under which head may be referred the law or custom of merchants (*lex mercatoria*), which is a particular system of customs used only among one set of the king's subjects, which, however different from the general rules of the Common Law, is yet engrafted into it, and made a part of it; being allowed for the benefit of trade to be of the utmost validity in all commercial transactions, for it is a maxim of law, that "*cuiuslibet in sua arte credendum est*." This law of merchants comprehends the laws relating to bills of exchange, mercantile contracts, sale, purchase and barter of goods, freight, insurance, &c. 1 Chitty's Bl. 76, n. (g).

LAW OF NATIONS. The Law of Nations consists of a system of rules or principles deduced from the law of nature, intended for the regulation of the mutual intercourse of nations. The law is founded on the principle, that the different nations ought to do to each other in time of peace as much good, and in time of war as little harm, as may be possible without injuring their own proper interests; and this law comprehends the principles of national independence, the intercourse of nations in peace, the privileges of ambassadors, consuls, and inferior ministers; the commerce of the subjects of each state with those of the others in times of war and of peace, or of neutrality; the grounds of just war, and the mode of conducting it; the mutual duties of belligerent and neutral powers; the limit of lawful hostility; the rights of conquest; the faith to be observed in warfare; the force of armistice, of safe conducts and passports; the nature and obligations of alliances; the means of negotiation, and the authority and interpretation of treaties. 1 Chitty's Commercial Law, 25, 26; Puffendorf.

See also title INTERNATIONAL LAW.

LAW OF NATURE: See title LAW.

LAW-WORTHY. Being entitled to, or having the benefit and protection of the law. Brady on Boroughs, 16, fo. ed.

LAY, TO. Signifies to allege, to state, &c., e. g.: "No inconvenience can arise to the defendant from either mode of laying the assault." *Per Curiam*, 2 Bos. & Pul. 427; 6 Mod. 38. "If you lay (i.e., allege, or state) an ouster in your declaration, you must lay a re-entry." *Per Holt*, C.J. So "laying the venue" signifies the stating, naming, or placing in the margin of a declaration any given county as the county in which the plaintiff proposes that the trial shall take place.

LEADING A USE. When lands were conveyed by that species of conveyance termed a "fine and recovery," the legal seisin and estate became thereby vested in the cognisee or recoveror, i.e., in the person who was the object of that conveyance. But if the owner of the estate declared his intention that such fine or recovery should enure or operate to the use of a third person, a use immediately arose to such third person out of the seisin of the cognisee or recoveror; and the Statute of Uses transferred the actual possession to such use, without any entry on the part of such third person. The deed by which the owners of estates so declared their intention with regard to the lands thus conveyed was termed either a deed to lead the uses, or a deed to declare the uses; when executed prior to the levying the fine, or suffering the recovery, it bore the former appellation; when executed subsequently thereto, it bore the latter. 1 Cru. Dig. 396.

See also titles CONVEYANCES; USES.

LEADING CASE. Amongst the various cases that are argued and determined in the Courts, some, from their important character, have demanded more than usual attention from the judges, and from this circumstance are frequently looked upon as having settled or determined the law upon all points involved in such cases, and from the importance they thus acquire are familiarly termed "leading cases." Such, for instance, are those cases collected in the valuable work of the late Mr. J. W. Smith, so well known to the profession under the title of "Smith's Leading Cases;" and similar collections have been made of the leading cases in Conveyancing Law (Tudor's), and in Equity Law (White & Tudor's), and in Mercantile Law (Tudor's).

LEADING QUESTION. A question put or framed in such a form as to suggest the answer sought to be obtained by the person interrogating. A counsel is said to put a leading question to a witness, when, instead of putting a simple interrogation, he states

LEADING QUESTION—continued.

a proposition as though he believed it to be true, with a view of leading the witness into the admission of it. Such questions may be asked upon cross-examination, but not upon examination in chief. They may also be asked with a view to discrediting one's own witness where he unexpectedly proves adverse.

See also title **WITNESSES**.

LEASE. A lease is a conveyance of lands or tenements to a person for life, for a term of years or at will, in consideration of a return of rent or some other recompense. The person who so conveys such lands or tenements is termed the lessor; and the person to whom they are conveyed the lessee; and when a lessor so conveys lands or tenements to a lessee, he is said to lease, demise, or let them. 4 Cruise, 58.

See also titles **ASSIGNMENT**; **CONVEYANCES**; **FORFEITURE**; **FRAUDS**, **STATUTE OF**; **LANDLORD AND TENANT**; **TENANCIES**; **UNDERLEASE**.

LEASE AND RELEASE. A species of conveyance commonly in use for conveying the fee simple or absolute property in lands or tenements from one person to another. In the reigns of Henry VI. and Edward IV. it was not unusual to transfer freehold estates in the following manner: A deed of lease was made to the intended purchaser for three or four years; and after he had entered into possession, a deed of release of the inheritance was executed to him, which operated by enlarging his estate into a fee simple. When it was found that the Statute of Uses transferred the actual possession without entry, the idea of a lease and release was adopted. This kind of conveyance was thus contrived:—A lease, or rather bargain and sale upon some pecuniary consideration for one year was made by the tenant of the freehold to the lessee or bargainee, i.e., to the person to whom the lands were to be conveyed; now this made the vendor stand seised to the use of the lessee or bargainee, and vested in the latter the use of the term for a year, to which the Statute of Uses immediately transferred the possession. Thus the bargainee, by being in possession, became immediately capable of accepting a release of the freehold and reversion (which must be made to a tenant in possession), and accordingly a release was made to him, dated the day next after the day of the date of the lease for a year, which at once transferred to him the freehold.

See also titles **CONVEYANCES**; **USES**.

LEGACIES. These are bequests (i.e., gifts by will) of personal property; they are of three kinds, namely:—

LEGACIES—continued.

(1.) General, called also pecuniary, legacies, being a gift of money or other fungible substance in quantity;

(2.) Specific legacies, being a gift of earmarked money, or of other earmarked fungible substance, in mass, or of any non-fungible substance by description; and,

(3.) Demonstrative legacies, being a gift of money or other fungible substance in quantity, expressed to be made payable out of a specified sum of money or other specified fungible substance; but such legacies become, upon any destruction of the specified source of payment, merely general legacies.

The following are examples of these three kinds of legacies, namely:—

(1.) General legacies: £500 in cash (*Richards v. Richards*, 9 Price, 226); £50 annuity payable out of, or charged upon, the personal estate (*Allon v. Medlicott*, 2 Ves. 417); £20 to buy a ring (*Apreece v. Apreece*, 1 V. & B. 364); my stock (*Goodlad v. Burnett*, 1 K. & J. 341); and, ordinarily, residuary gifts.

(2.) Specific legacies: sum of money in such a bag (*Lawson v. Stitch*, 1 Atk. 508); sum of money in the hands of A. (*Hinton v. Pinke*, 1 P. Wms. 540); A.'s debt (*Fryer v. Morris*, 9 Ves. 300); A.'s bond (*Davies v. Morgan*, 1 Beav. 405); my East India Bonds (*Sleech v. Thorington*, 2 Ves. 562); gift of one part of debt to A., and of residue thereof to B. (*Ford v. Fleming*, 2 P. Wms. 469); gift of debt to A. for life, remainder to B. (*Ashburner v. Macguire*, 2 Bro. C. C. 108); a lease of lands (*Long v. Short*, 1 P. Wms. 403); and occasionally residuary gifts. *Page v. Leapingwell*, 18 Ves. 463.

(3.) Demonstrative legacies: £1000 out of my Reduced Stock (*Kirby v. Potter*, 4 Ves. 748); £12,000 out of my funded property (*Lambert v. Lambert*, 11 Ves. 607); £500 annuity or legacy payable out of, or charged on, lands. *Savile v. Blacket*, 1 P. Wms. 778.

These distinctions between legacies lead to the following consequences:—

I. With reference to the *Ademption* of legacies:

(1.) General legacies are not, as a general rule, liable to ademption; so that although locally described, the alteration of locality by removal does not adeem the legacy (*Norris v. Norris*, 2 Coll. 719); but a general legacy to a child would be adeemed in whole, or *pro tanto*, by a subsequent portion given to that child (see title **SATISFACTION OF LEGACY BY PORTION**, *infra*).

(2.) Specific legacies are invariably liable to ademption, e.g., by the specific thing ceasing to belong to the testator and not becoming his again at or before his death (*Stanley v. Potter*, 2 Cox, 182), and without

LEGACIES—continued.

reference to the *animus adimendi* of the testator (*Ashburner v. Macguire*, 2 Bro. C. C. 108); or even, in case of the specific thing being specific by local description merely, by the alteration of that description through the removal of the goods in the testator's life-time (*Green v. Symonds*, 1 Bro. C. C. 127, n.; *Heseltine v. Heseltine*, 3 Mad. 276), unless the local description is again in existence at the testator's death (*Land v. Devaynes*, 4 Bro. C. C. 537); or unless the original removal was due to fire or other inevitable cause (*Chapman v. Hart*, 1 Ves. 271), or to fraud (*Shaftsbury v. Shaftsbury*, 2 Vern. 747); or by the destruction of the specific thing, although it is insured and the insurance is recovered after the testator's death, and although the destruction occurred contemporaneously with his death (*Durrant v. Friend*, 5 De G. & Sm. 343); or in the case of a debt, by the discharge of the debt in the testator's lifetime (*Rider v. Wager*, 2 P. Wms. 329); (*Barker v. Rayner*, 5 Madd. 208); although the debt should have been a mortgage debt, and part of it is outstanding at the testator's death on a new security (*Gardner v. Hatton*, 6 Sim. 93); but in general the partial receipt of a debt is only an redemption *pro tanto* (*Jones v. Southall*, 32 Beav. 31); and a destruction by Act of Parliament of stock of one kind followed by a substitution for it of stock of another kind is no redemption (*Partridge v. Partridge*, Cas. t. Talb. 226; *Oakes v. Oakes*, 9 Hare, 666); as neither is the unauthorized although provident alteration during lunacy of a specific thing bequeathed by the lunatic when sane (*Taylor v. Taylor*, 10 Hare, 475). A specific legacy is also deemed by an assignment of the specific thing, e.g., leaseholds (*Cowper v. Maintell*, 22 Beav. 223); but not by a pawn or pledge thereof (*Knight v. Davis*, 3 My. & K. 361); and the executors must redeem same at the cost of the general estate, although the executors need not in the case of a bequest of fully paid-up shares, or of other like choses already perfected in the testator's lifetime, pay the calls which are made thereon subsequently to the testator's death. *Armstrong v. Barnett*, 20 Beav. 424.

(3.) Demonstrative legacies, like general legacies, are not liable to redemption, the fund specified as that out of which they are to be paid being the primary fund only, and the general personal estate being liable in *subsidium* (*Savile v. Blacket*, 1 P. Wms. 777); but such a legacy would be deemed if the specified fund were declared to be the only fund for payment (*Coard v. Holderness*, 22 Beav. 391); and, *semble*, it would be deemed in the case of a child by a substituted portion to that child.

LEGACIES—continued.

II. With reference to the *Abatement* of legacies:—

(1.) General legacies are liable to abate as between themselves in case the general personal estate, and other the property (if any) available for their payment is insufficient (after payments thereof which are of prior right) to pay them all in full, the payments of prior right being debts, specific legacies, and demonstrative legacies which have remained demonstrative; see title **MARSHALLING AS BETWEEN LEGATEES**. A residuary bequest, if general, abates with general legacies (*Petre v. Petre*, 14 Beav. 197); but a general legacy which is given for value, e.g., for the relinquishment of dower (*Burridge v. Brady*, 1 P. Wms. 126; 3 & 4 Will. 4, c. 105, s. 12), or for the release of a debt actually due (*Davies v. Bush*, 1 Younge, 341), is preferred to other general legacies; and similarly any legacy, although general, which the testator expresses a clear intention should be preferred. *Levin v. Levin*, 2 Ves. 415.

(2.) Specific legacies are liable to abate as between themselves, and *pari passu* with demonstrative legacies which have remained demonstrative, but are preferred to general legacies.

(3.) Demonstrative legacies which have remained demonstrative are liable to abate as between themselves, and *pari passu* with specific legacies, but are preferred to general legacies (*Roberts v. Pocock*, 4 Ves. 150); but demonstrative legacies which have become general are not so preferred, *Mullins v. Smith*, 1 Dr. & Sm. 210.

III. With reference to the *repetition* of legacies,

See title **SATISFACTION OF LEGACY BY LEGACY**.

IV. With reference to the *satisfaction* of legacies,

See title **SATISFACTION OF LEGACY BY LEGACY**.

V. With reference to the *marshalling* of legacies,

See title **MARSHALLING OF ASSETS**.

VI. With reference to legacies being *annuities*,

See title **ANNUITIES**.

VII. With reference to the *lapse* of legacies,—

See title **LAPSE**.

VIII. With reference to *interest* on legacies:—

(A.) General legacies carry interest from the time they are payable. Therefore,

(a.) Where the testator has fixed no time of payment, they are not payable until one year after his decease, and therefore only carry interest as from that date (*Child v. Elsworth*, 2 De G. M. & G. 679), unless they are charged on land, in which case

LEGACIES—continued.

they are payable, and therefore carry interest, as from the testator's death (*Mazwell v. Wattenhall*, 2 P. Wms. 26); and from whichever of these two dates they are payable, they will carry interest, although the actual payment of the legacies themselves should be then impracticable (*Wood v. Penoyre*, 13 Ves. 333), and whether the assets are productive or not (*Pearson v. Pearson*, 1 S. & L. 10); and

(b.) Where the testator has fixed a time for payment;

(aa.) If that time is fixed for the convenience of the estate merely, they will be payable, and will therefore carry interest, as from the testator's death or as from one year after the testator's death, according as they are or are not charged on land (*Varley v. Winn*, 2 K. & J. 700); but

(bb.) If that time is not fixed for the convenience of the estate merely, then it must be observed; and if it exceed the year, the interest will be proportionately delayed (*Heath v. Perry*, 3 Atk. 101); but if it fall within the year, the interest will be proportionately accelerated (*Lord Lonsborough v. Somerville*, 19 Beav. 295); and

(c.) Whether the testator has fixed a time of payment or not, the following other legacies are payable, and therefore also carry interest, as from the testator's death.

(1.) A legacy which is in satisfaction of a debt, whether of the testator's own (*Clark v. Sewell*, 3 Atk. 99) or of another man. *Shirt v. Westby*, 16 Ves. 393.

(2.) A legacy by a parent (*Beckford v. Tobin*, 1 Ves. 310), or person in *loco parentis* (*Wilson v. Maddison*, 2 Y. & C. C. C. 372) to a legitimate child being an infant, but not to a legitimate child being an adult (*Raven v. Waite*, 1 Sw. 553), nor to a legitimate child although an infant, being otherwise provided with maintenance (*In re Rouse's Estate*, 9 Hare, 649), nor to an illegitimate child (*Beckford v. Tobin*, 1 Ves. 310) in the absence of an express direction as to maintenance. *Newman v. Bateson*, 3 Sw. 689.

(3.) A legacy which is settled upon several takers in succession (*Angerstein v. Martin*, T. & R. 232; *Hove v. Dartmouth (Earl)*, 7 Ves. 137); but a legacy of consumable articles, other than stock in trade (*Philips v. Beal*, 32 Beav. 25), and other than farming stock (*Groves v. Wright*, 2 K. & J. 347), being an absolute gift (*Andrew v. Andrew*, 1 Coll. 690), unless where the consumable articles are included in a residuary bequest comprising other articles of a different nature (*Rundell v. Russell*, 3 Mer. 195), the rule as to payment of interest to the tenant for life as from the death is inapplicable.

(B.) Specific legacies carry interest from the time they are payable, and being con-

LEGACIES—continued.

sidered as severed from the bulk of the estate and appropriated for the benefit of the specific legatee as from the death of the testator, they carry interest as from the death (*Barrington v. Trietam*, 6 Ves 345); and for that matter it makes no difference that the testator has directed them to be paid within twelve calendar months after his decease (*Bristow v. Bristow*, 5 Beav. 289), or has otherwise postponed the enjoyment of the principal. 2 Rep. Leg. 1250, 4th ed.

(C.) Demonstrative legacies which have remained demonstrative, carry interest, *semble*, from the testator's death in like manner as specific legacies; but where they are payable out of reversionary property, they carry interest, *semble*, only as from the date at which the reversion falls in (*Earle v. Bellingham*, 24 Beav. 448); and if they have ceased to be demonstrative, and are become general legacies, they are subject to the rules above stated regarding the payment of interest on general legacies. *Mullins v. Smith*, 1 Dr. & Sm. 210.

Where interest is payable, it is usually at the rate of 4 per cent. (*Wood v. Bryant*, 2 Atk. 523), free of all deductions on account of cost of remittance or otherwise (*Cockerell v. Barber*, 16 Ves. 461). And

IX. With reference to legacies charged on land:—

In general, a legacy which is vested is, in case of the death of the legatee subsequently to the vesting and previously to the commencement of the actual enjoyment of the legacy, transmissible to the personal representatives of the legatee, and the Courts, both of Law and Equity, favour in all cases the vesting of legacies.

Thus, even at Law, all legacies are considered as vested unless where there is a condition precedent to the vesting; and a legacy once vested will not be divested by any condition subsequent either at Law or in Equity unless the latter condition is exactly fulfilled (*Harrison v. Foreman*, 5 Ves. 207; *Doe d. Blakiston v. Haslewood*, 10 C. B. 544). Also, words of apparent contingency are construed as words of futurity, and as having reference to the period of enjoyment only and not of the vesting (*Maddison v. Chapman*, 4 K. & J. 709). This latter principle being so strong in the case as well of *personal* as of *real* estate that a bequest or devise to the children of A. as a class vests in the existing children of A. at the death of the testator, although A. is then living, and opens up to admit after-born children of A. (if any) successively as they are born (*McLachlan v. Tuitt*, 2 De G. F. & J. 449). And words of apparent conditionality are in like manner construed as words of futurity, having

LEGACIES—continued.

reference to the enjoyment only and not to the vesting (*Manfield v. Dugard*, 1 Eq. Ca. Abr. 194; *Doe d. Wheedon v. Lea*, 3 T. R. 41; *Pearson v. Simpson*, 15 Ves. 29); and conditions apparently precedent will, if possible, be construed as conditions subsequent, so as rather to vest the estate meanwhile and leave it liable to be divested afterwards, than prevent it from vesting at all in the meantime (*Edwards v. Hammond*, 1 Bos. & Pul. N. R. 324, n.); but, of course, this cannot always be done (*Bull v. Pritchard*, 5 Hare, 567); and where the postponement of enjoyment is merely for the convenience of the estate, the future interest will be held a vested interest (*Blamire v. Geldart*, 16 Ves. 314); and although the gift is residuary, the Courts strongly incline to construing it as vested, so as to avoid an intestacy. *Booth v. Booth*, 4 Ves. 399.

All the foregoing statement applies equally to real and to personal estate; but the Common Law, from the favour it shews to the heir, who is always an ascertained or ascertainable person, holds that a legacy payable out of lands (not being also a devise of the very lands themselves or part thereof), although it be vested, yet sinks for the benefit of the inheritance in case the legatee die before the period of actual enjoyment, no matter whether the legacy be to a child as a provision or portion for that child (*Pawlett v. Pawlett*, 1 Vern. 321), or be to a stranger (*Smith v. Smith*, 2 Vern. 92), unless where the postponement of the enjoyment is for the convenience of the estate merely (*King v. Withers*, 3 P. Wms. 414) or unless the testator expressly directs the contrary (*Watkins v. Cheek*, 2 S. & S. 199). The like rules applied *mutatis mutandis* to legacies payable out of a mixed fund of real and personal estate. *Chandos (Duke) v. Talbot*, 2 P. Wms. 601.

Legacies charged on land carry interest as from the testator's death (*Maxwell v. Wettenhall*, 2 P. Wms. 26), and not (like personal legacies) as from one year after the testator's death. *Child v. Elsworth*, 2 De G. M. & G. 679.

See also title ANNUITIES.

LEGACY DUTY. This is a duty imposed upon personal property (other than leaseholds) devolving under any will or intestacy. It was imposed for the first time in 1780, and became payable upon the receipt of the property (*Green v. Croft*, 2 H. Bl. 30); but under the stat. 36 Geo. 3, c. 52, which regulates the duty at the present day, it is payable on the property itself, irrespectively of the receipt thereof, and generally under the last-mentioned Act and the two subsequent stats., 45 Geo. 3, c. 28, and 55 Geo. 3, c. 184, which

LEGACY DUTY—continued.

are supplementary to the prior Act, the duty is payable upon all legacies "paid, delivered, retained, satisfied, or discharged."

According to Hanson (Probate, Legacy, and Succession Duty Acts), p. 14, "The legacy duties now in force are those imposed by the 55 Geo. 3, c. 184, according to which the duty is payable,—

(a.) For every legacy of the amount or value of £20 and upwards given by will either

(aa.) Out of personal estate, or

(bb.) [Where testator has died since 5th April, 1805] out of real estate, or out of the proceeds of the sale or mortgage of real estate; and also

(b.) For the clear residue either when devolving (aa.) Of the on one person, and

(c.) For every share of the clear residue when devolving on two or more persons, (bb.) [Where testator has died since 5th

April, 1805], of the proceeds of the sale or mortgage of real estate;

being a legacy (a), residue (b), or share of residue (c), paid, delivered, retained, satisfied, or discharged after the 31st August, 1815."

With reference to powers of appointment over property,—

(1.) Where the power is general, an appointment by will in exercise of a power created, either by deed (*In re Cholmondeley*, 1 Cr. & Mee. 149), or by will, is a legacy under the will of the person exercising the power; and it matters not whether the gift under the appointment be out of real or out of personal estate, or whether it be the gift of an annuity or a specified sum of money; and by the joint effect of the statutes 36 Geo. 3, c. 52, s. 18, and 16 & 17 Vict. c. 51, s. 4, the donee of the general power (i.e., the appointor), is chargeable with legacy or (at any rate) succession duty, when he makes an appointment; so that, in fact, two duties are payable.

(2.) Where the power is limited,—an appointment by will (*Att.-Gen. v. Henniker*, 7 Ex. 331), or by deed (*Sweeting v. Sweeting*, 1 Dr. 331), in exercise of a power,—

(a.) Which is created by will,—is a legacy under the will creating the power;

LEGACY DUTY—continued.

- (b.) Which is created by deed,—is a succession under the deed creating the power. (And see SUCCESSION DUTY.)

In the case of a conflict of laws,—

- (1.) As regards personal property (not being chattels real), the law of the domicile determines the liability to, or exemption from, legacy and also succession duty (*Thomson v. Adm.-Gen.*, 12 Cl. & F. 1; *Wallace v. Att.-Gen.*, L. R. 1 Ch. 1);
- (2.) As regards chattels the *lex loci* real, and real property generally, determines;
- (3.) As regards powers of appointment over property,

- (a.) If the property is pure personal estate, and

(aa.) The appointment is made by will, the *lex loci situs* subjects the same to succession duty, although the domicile of the testator should be different from the *situs* of the property; and this is so, whether the power be created by deed (*In re Lovelace*, 4 De G. & J. 340), or by will (*In re Wallop's Trusts*, 1 De G. J. & S. 656); and for this purpose the *situs* may be constructive merely; but if

(bb.) The appointment is made by deed, then only the actual *situs*, and not the constructive, determines; and

- (b.) If the property is chattels real, or real property generally, the *lex loci rei sitæ* governs exclusively. (Compare SUCCESSION DUTY.)

Legacy Duty is to be paid at the time when the property chargeable with it is transferred to, or retained for, the person entitled (36 Geo. 3, c. 52, s. 6), and therefore in the case of reversionary property not until the same falls into possession, naturally or by acceleration. (Contrast SUCCESSION DUTY.) In case the reversionary property should devolve under several wills or intestacies before it falls into possession, a cumulative duty is payable in respect of every such will and intestacy (*Att.-Gen. v. Malkin*, 2 Ph. 64). (Contrast SUCCESSION DUTY.) If any legacy or residue is not wholly satisfied or distributed at once, the duty may be paid on the value of the part from time to time satisfied or distributed, such value to be estimated as the property exists at the time of satisfaction or distribution, and not at the time of the testator's death (*Att.-Gen. v. Cavenish*, Wightw. 82). (Compare SUCCESSION

LEGACY DUTY—continued.

DUTY.) If the legacy is a gross sum vesting at once in the legatee, then whether the same be or not given over on a contingency, duty on the whole amount is payable all at once, with an apparent right to be recouped any over-payment in case the gift over takes effect; in which case the legatee over becomes apparently chargeable with the same, and becomes certainly chargeable at the higher rate, if his rate should be higher than that of the first legatee (36 Geo. 3, c. 52, ss. 17, 34) (compare SUCCESSION DUTY); but if the legacy is not a gross sum, but an annuity for life or for years, then, whether the same be or not charged upon some other legacy, and whether the same be or not given over on a contingency, duty is payable on the value only of the annuitant's interest, calculated according to the tables of the Act 16 & 17 Vict. c. 51, and is to be paid by four successive annual instalments, such instalments being payable with the four first successive payments of the annuity itself, with a right to be recouped any over-payment in case the gift over takes effect; but in the case of a direction to purchase an annuity, or of a perpetual annuity, the duty is to be paid all at once on the value of the annuitant's interest, calculated as aforesaid (16 & 17 Vict. c. 51, s. 32). (Compare SUCCESSION DUTY.) In the case of a legacy producing income to several persons in succession,—

(a.) If all the successive legatees are chargeable with the same rate of duty, the whole duty is payable at once for the capital of the fund; and

(b.) If the successive legatees are chargeable with different rates of duty, the duty is to be calculated and paid upon each successive partial interest, in the same manner as if the same were an annuity, and, last of all, upon the ultimate interest (being the absolute interest), in the same manner as if the same were an immediate bequest of the capital (36 Geo. 3, c. 52, s. 12). (Compare SUCCESSION DUTY.) In the case of legatees in joint tenancy, each is chargeable at his own rate of duty in the first instance upon his then share, and afterwards (if it should so happen) upon his accrued share. (Compare SUCCESSION DUTY.) In the case of a legacy of money directed to be converted into land;

(a.) If the bequest is in fee, the gross amount is chargeable with duty as an absolute bequest; and

(b.) If the bequest is to several successive persons, the interest of each successor until the money is actually invested in real estate is chargeable with duty as for an annuity (36 Geo. 3, c. 52, s. 19), and any person becoming absolutely entitled is

LEGACY DUTY—*continued.*

chargeable with duty as upon an absolute bequest; and after the money is actually invested in real estate, each such person is chargeable as for succession duty (16 & 17 Vict. c. 51, s. 30). No legacy duty is payable upon a fund which is specially provided for the payment of duty.—“no duty upon duty.”—(36 Geo. 3 c. 52, s. 21). (Compare SUCCESSION DUTY.)

LEGAL MEMORY. This, as distinguished from living memory, extends as far back as the year of our Lord 1189, being the year in which King Richard I. returned from Palestine. See also title **MEMORY OF MAN**; also title **TIME OUT OF MIND**. See also Co. Litt. 114 b; 2 Inst. 238; 2 Ves. Sen. 511; 2 & 3 Will. 4 c. 71, s. 1.

LEGITIMATION. The making legitimate or lawful, as where children are born bastards, the act by which they are made legitimate is called legitimation, which in Scotland may be effected by the subsequent marriage of the parents (Cowell; Tomlins). But when an attempt was made in the Parliament of Merton to introduce the like law into England, the barons of Parliament replied, “*Nolumus leges Angliæ mutare huc usque utilitas atque approbatas*,” and thus frustrated the attempt. It is the rule of the English law that legitimation depends on the *status* of the mother when she gives birth to the child, and has no reference (as in Roman Law) to the date of the child's conception: “*Pater est quem nuptiæ demonstravit*.” Under the stat. 21 & 22 Vict. c. 93, a declaration of legitimacy may be obtained in certain cases.

LEPROSO AMOVENDO. An old obsolete writ that lay for the removal of a leper, or leper, who obtruded himself upon the company of his neighbours, either in the church or other public place of meeting in a parish. H. N. B. 423; *Les Termes de la Ley*.

LE ROY LE VEUT. The Royal assent to public bills is given in these words; and to private bills the words are, *soit fait comme il est désiré*, i.e., let it be done as it is desired; but when the Royal denial is given to a bill presented by Parliament, the words in which it is conveyed are *le roy s'avisera*, i.e., the king will advise upon it.

LÉSION. In French law, upon a sale, it is competent for the purchaser to rescind the contract on account of *lésion*, i.e., the worsened value of the thing sold, when it exceeds seven-twelfths of the price given.

LÉSION—*continued.*

A purchaser cannot bargain away his right in this respect, but he must exercise it within two years. In the contract of exchange there is no right of rescission, *pour cause de lésion*. Code Civil, 1706.

LESSOR OF THE PLAINTIFF. The lessor of the plaintiff in an action of ejectment was the party who really and in effect prosecuted the action, and was interested in its result. He must at the time of bringing the action have had the legal estate, and the right to the possession of the premises sought to be recovered (7 T. R. 47; 2 Burr. 668; 8 T. R. 2, n.; 1 Ch. Pl. 187). The reason of his having been called the lessor of the plaintiff, arose from the circumstance of the action having been carried on in the name of a nominal plaintiff (called John Doe), to whom he (the real plaintiff) had granted a fictitious lease, and thus had become his lessor.

See title **EJECTMENT** for the modern process.

LETTERS OF ADMINISTRATION. The instrument by virtue of which administrators derive their title and authority to have the charge or administration of the goods and chattels of a person who dies intestate. The ordinary was the person whom the law, in the first instance, appointed to have the charge or administration of the goods and chattels of such deceased person; and the persons who are called administrators were the officers of the ordinary, appointed by him in pursuance of the statute, 13 Edw. 1, stat. 1, c. 19. Sometimes, however, letters of administration are granted when a party has actually made a will, but has omitted to appoint any executor, and is therefore said to be *quasi intestatus*; or when, having made a will, and appointed an executor, the executor dies before the testator, or before he has proved the will, or refuses to act, or is incapable of acting, and in all such cases the administration is granted with the will annexed, and the letters of administration are thence termed letters of administration with the will annexed (*cum testamento annexo*). See 1 Wms. Executors, 348; Rog. Eco. Law, 949.

See title **ADMINISTRATION**.

LETTERS OF CREDIT: See title **CREDIT**, **LETTERS OF**.

LETTER OF LICENCE. A letter or written instrument which used sometimes to be given by creditors to their debtor who had failed in trade, &c., allowing him longer time for the payment of his debts, and protecting him from arrest in the meantime (Tomlins). But now imprison-

LETTER OF LICENCE—*continued*.

ment for debt, and with it all proceedings in insolvency, have been abolished.

See titles **IMPRISONMENT FOR DEBT**; **INSOLVENCY**.

LETTERS MISSIVE. A letter missive, for electing a bishop, is a letter which the king sends to the dean and chapter, together with his usual licence to proceed to elect a bishop on the avoidance of a bishopric, which letter contains the name of the person whom he would have them elect. A letter missive in Chancery is a letter from the Lord Chancellor to the defendant in a suit in Equity, informing him that the bill has been filed against him, and requesting him to appear to it. Such a letter is the step taken in a Chancery suit to compel a defendant's appearance to a bill when such defendant is a peer or a peeress, being thought a milder or more complimentary mode of procedure than serving such a defendant with a subpoena in the first instance. 1 Dan. Ch. Pr. 366-9.

LETTERS PATENT. Letters by which the king makes his grants, whether of lands, honours, franchises, or anything else. They are so called because they are not sealed, but are exposed to open view, with the great seal pendant at the bottom, and they are usually directed or addressed by the king to all his subjects at large; and herein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons and for particular purposes, which therefore not being proper for public inspection are closed up and sealed on the outside, and are therefore called letters close (*litteræ clausæ*), and are recorded in the close rolls in the same manner as the others are in the patent rolls.

See also title **PATENTS**.

LETTERS OF REQUEST. Are the formal instrument by which an inferior judge of ecclesiastical jurisdiction requests the judge of a superior Court to take and determine any matter which has come before him. And this he is permitted to do in certain cases by the authority of an exception to the stat. 23 Hen. 8, c. 9, which exception is to the effect, that a person may be cited in a Court out of his own diocese, when any bishop or other inferior judge, having jurisdiction in his own right, or by commission, makes request or instance to the archbishop or bishop, or other superior, to take, hear, examine, or determine the matter before him; but this is to be done in cases only where the law, civil or canon, doth affirm execution of such request of jurisdiction

LETTERS OF REQUEST—*continued*.

to be lawful and tolerable. Upon this exception it has been held that the Dean of the Arches is bound, *ex debito iudicis*, to receive letters of request without the consent of the party proceeded against; but this power of requesting the decision of a superior Court is generally employed at the desire of the parties. Roger's Ecc. Law, 789; 2 Lee, 312, 319; Hob. 185.

LEVANT AND COUCHANT. These words are thus used by law writers:—If lands were not sufficiently fenced to keep out cattle, they would occasionally stray thereon; but the landlord could not restrain them as *damage feasant* till they had been *levant* and *couchant* on the land, that is, had been long enough there to have lain down and risen up to feed, which in general is held to be one night at least. Gilb. Dist. 47.

LEVARI FACIAS. A writ of execution directed to the sheriff, commanding him to levy or make of the lands and chattels of the defendants the sum recovered by the judgment. Excepting in the case of outlawry, however, this writ has been completely superseded in practice by the writ of *elegit*. 1 Arch. Prac. 693; Tidd.

LEVY (*levare*). To exact, to raise, to collect, to gather together, &c. Thus a sheriff is commanded by a writ to levy a certain sum upon the goods and chattels of the debtor, i.e., to collect a certain sum by appropriating the goods and chattels to that purpose.

LEX DOMICILII: See title **DOMICILE**.

LEX FORI. This phrase denotes the law of the forum or court in which an action or suit is proceeding. It regulates everything pertaining to procedure and evidence, including the forms of practice, the times for commencing and proceeding with actions, the requisites of pleading, and such like. It sometimes overrides or excludes the *Lex loci actus seu contractus*, whence there arises a **CONFLICT OF LAWS** (see *Leroux v. Brown*, 12 C. B. 801). But of necessity it agrees in all cases with the *Lex loci rei sitæ*. See Story on Conflict of Laws, and Forsyth's Cases and Opinions.

LEX LOCI ACTUS VEL CELEBRATIONIS: See next title.

LEX LOCI CONTRACTUS. This is an ambiguous phrase, denoting either

(1.) The law of the place in which the contract is to be performed (*in eo loco unusquisque contraxisse videtur in quo ut solvetur se obligavit*); or

(2.) The law of the place in which the contract is entered into.

LEX LOCI CONTRACTUS—continued.

According to the former of these two senses, it is the *Lex loci solutionis*, according to the latter of them it is the *lex loci actus*, and it is desirable that these two phrases should be used for distinction's sake, when anything is to turn on the distinction. The former phrase, namely, the *Lex loci solutionis*, regulates the mode of recovery upon the contract, and the latter phrase, viz., the *Lex loci actus*, regulates the formalities or ceremonies requiring to be observed upon entering into a contract. In each case the law of the place denoted by the phrase is to be singly regarded, unless, indeed, *pro majori cautela*.

LEX LOCI REI SITE. This phrase denotes the law of the place of the situation of the property, as does also the phrase *Lex loci situs*; but the former phrase is exclusively applicable (and ought to be confined) to real property, including leaseholds, and the latter to personal property exclusive of leaseholds. There are also certain differences between the two laws expressed by the two respective phrases; thus, the *Lex loci rei site* is a paramount law, and regulates the devolution of lands whether upon a testacy or an intestacy; it also determines what shall be the forum, so that it is never in conflict with the *Lex fori*; and lastly, it completely disregards the *Lex domicilii*. The *Lex loci situs*, on the other hand, is different in all these three respects, being subsidiary to the *Lex domicilii*, being frequently in conflict with the *Lex fori*, and having absolutely no influence upon the devolution of property.

LEX LOCI SITUS: See the preceding title.

LEX LOCI SOLUTIONIS: See title **LEX LOCI CONTRACTUS**.

LEX MERCATORIA: See title **LAW MERCHANT**.

LIBEL. This word is commonly used in two senses, 1st, in the Court of Arches, and some few other Courts, as meaning a formal allegation in the nature of a pleading, containing the substance of the plaintiff's complaint. But, 2ndly, and more commonly, it signifies some malicious defamation of any person expressed otherwise than by mere words (see title **SLANDER**) as by writing, print, figures, signs, or any other symbols. Malice is an essential requisite to constitute any writing a libel, and the truth of defamatory writings is not at Common Law any justification of them, but under the Act 6 & 7 Vict. c. 96, it is competent for the defendant to plead

LIBEL—continued.

the truth of the libel, and that it was published for the public good.

Previously to the year 1792, the functions of the jury in actions or prosecutions for libel were confined to finding the fact of publication merely, or the absence of that fact (*Dean of St. Asaph's Case*, 21 St. Tr. 847); but since that year, and in virtue of Fox's Libel Act, 1792 (32 Geo. 3, c. 60), the jury now find a mixed verdict of libel or no libel, returning generally the verdict of guilty or not guilty, in which both law and fact are blended. The functions of the judge, which were formerly very large, have been correspondingly diminished, and are now confined to points arising incidentally in the trial, and which require to be summarily disposed of, but including amidst such matters a rather important defence in actions of this sort, namely, **PRIVILEGE**, as to which see that title.

LIBERATE. A warrant which used formerly to issue out of Chancery under the great seal to the Treasurer, Chamberlain, and Barons of the Exchequer, &c., for the payment of any yearly pension or other sum of money granted under the great seal. Sometimes it was directed to the sheriff for the delivery of land or goods taken upon forfeiture of a recognizance; and sometimes to a gaoler for the delivery of a prisoner who had put in bail for his appearance. It was most in use for the delivery of goods on an extent; for until the liberate no property in the goods passed to the consignee in the recognizance. Tomlins.

LIBERTY: See title **FRANCHISE**.

LIBERTY TO HOLD PLEAS. The liberty of having a Court of one's own; thus, certain lords had the privilege of holding pleas within their own manors.

LICENCE. A licence is a mere permission to do an act, which if done without that permission would (a), with respect to land, be a trespass *quare clausum fregit*; and (b), with respect to goods, be a tort in respect of the goods, whether a conversion of them or a detainer of them from the true owner.

As a general rule, licences in respect of land are revocable at the will of the grantor; for they confer no interest in the land; but where the licence is something more than a licence, in other words, where it is accompanied with a grant, it is irrevocable while the grant continues (*Wood v. Leadbitter*, 13 M. & W. 844), no matter whether it is made by deed or parol. Moreover, a licence is irrevocable when the licensee, acting upon it, has executed works of a permanent and expensive cha-

LICENCE—continued.

racter. *Winter v. Brockwell*, 8 East, 308; *Bankart v. Tenant*, L. R. 10 Eq. 141.

Where a licence is revocable, it may be revoked in various ways, namely, either (1) by an express withdrawal of it; or, (2), by any other act adverse to its continuance. *Wallis v. Harrison*, 4 M. & W. 538.

Similarly, where the licence is in respect of goods.

By the C. L. P. Act, 1852, Sched. B. 44, the defendant licensee may plead that he did the act complained of by the leave and licence of the plaintiff; and the plaintiff may then take issue on that plea (*Barnes v. Hunt*, 11 East, 451), or may (in a fit case) new assign (*Kavanagh v. Gudge*, 7 M. & G. 316), or may reply specially. *Price v. Peek*, Bing. N. C. 380.

LIE. To subsist, to exist, to be sustainable, &c. Thus, the phrase, "an action will not lie," signifies that an action cannot be sustained, or that there is no ground upon which to found the action.

LIEN. A qualified right of property which a person has in or over a thing, arising from such person's having a claim upon the owner of such thing. Thus, the right which an attorney has to keep possession of the deeds and papers of his client until such client has paid his attorney's bill is termed the attorney's lien upon those deeds, papers, &c. There are two sorts of lien, viz., particular and general. A particular lien is the right which a person has to retain the specific thing itself in respect of which the claim arises; a general lien is the right which a person has to retain a thing not only in respect of demands arising out of the thing itself so retained, but also for a general balance of account arising out of dealings of a similar nature. A lien may exist over real and personal property equally; but there is this difference in the two cases, namely, (1), that the lien on personal property is dependent on possession, and ceases when the possession ceases; whereas, (2), the lien on real property is independent of possession, and indeed implies that the person claiming the lien is out of the possession, e.g., in the case of a vendor's lien for unpaid purchase-money, or of a purchaser for his deposit. The lien is, however, in all cases commensurate only with the interest of the person through whom it arises.

See also title STOPPAGE IN TRANSIT.

LIFE ESTATE: See title ESTATE.

LIFE RENT. A rent payable to, or receivable by, a person for the term of his or her life, e.g., a jointure rent-charge, a

LIFE RENT—continued.

life annuity issuing out of lands, and such like.

LIAGEANCE: See title ALLEGIANCE.

LIMIT. To mark out, to define, to fix the extent of. Thus, to limit an estate means to mark out or to define the period of its duration, and the words employed in deeds for this purpose are thence termed words of limitation, and the act itself is termed limiting the estate. Thus, if an estate be granted to A. for the term of his natural life the words "term of his natural life" would be the words of limitation, and the estate itself would be limited to A. for that period. Sometimes very great importance attaches to the words of limitation that are used; for example, the Rule in *Shelley's Case* is entirely a rule of words; and again, in every conveyance (except by will) of an estate of inheritance, whether in fee tail or fee simple, the word "heirs" is necessary to be used as a word of limitation to make out the estate; for if a grant be made to a man and his seed, or to a man and his offspring, or to a man and the issue of his body, all these are insufficient to confer an estate tail, and only convey an estate for life for want of the word "heirs."

LIMITATION. Confinement within a certain time, &c. The word "limitation," as applied to actions, signifies the period of time which the law gives a man to bring his action for the recovery of any thing; and this period of time within which a man must bring his action in order to recover the thing sought is limited by the legislature in some cases to two years, in some to six years, and so on. The Acts of Parliament which prescribe these limits within which actions must be commenced are thence called the Statutes of Limitation, and the subject generally is termed limitation of actions. These statutes are principally the following:—

- (1.) 21 Jac. 1, c. 16, for actions on torts and on simple contracts;
- (2.) 3 & 4 Will. 4, c. 42, for actions on specialties;
- (3.) 9 Geo. 3, c. 16, for suits by the Crown; and
- (4.) 3 & 4 Will. 4, c. 27, for actions of ejectment and such like.

The statute 37 & 38 Vict. c. 57 (Real Property Limitation Act, 1874), which comes into operation on the 1st of January, 1879, reduces the periods prescribed by the 3 & 4 Will. 4, c. 27, *supra*.

LIMITATION OF ESTATES. The word "limitation" as applied to estates signifies the limits of duration beyond which an estate cannot last, as when an estate is so expressly confined and limited by the words

LIMITATION OF ESTATES—continued.

of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail; as when land is granted to a man so long as he is lord of the manor of Dale, or while he continues unmarried, or until out of the rents and profits he shall have made £500, and so on. In such cases the estate determines as soon as the contingency happens (*i.e.*, when he ceases to be lord of the manor, marries a wife, or has received the £500), and the next subsequent estate which depends upon such determination becomes immediately vested in possession without any act to be done by him who is next in expectancy. 1 Inst. 234; Litt. 347. See also for further explanation of the phrase "limiting an estate" title **LIMIT**.

LIMITED ADMINISTRATION. An administration of a temporary character, granted for a particular period, or for a special or particular purpose, as distinguished from an ordinary administration which is not granted subject to such limitations or conditions. Such, for instance, is an administration *durante minore etate*, which becomes necessary when an infant has been appointed sole executor, or the person upon whom the right to administration devolves is an infant, in which case administration is granted to some other proper person for a limited period, *viz.*, until the infant attains the full age of twenty-one years, and is capable of taking the burden of the administration upon himself.

See also title **ADMINISTRATION, LETTERS OF**.

LIMITED EXECUTOR. The appointment of an executor may be either absolute or qualified. It is absolute when there is no restriction, condition, or limitation imposed upon him in regard to the testator's effects, or no limitation in point of time. It may be qualified by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised, and when so qualified the executor is frequently, in reference to his limited or qualified powers, termed a limited executor. Thus, if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death, or at an uncertain time, as upon the death or marriage of his son, such an executor with reference to the time he should begin to execute his office would be a limited executor. So also an executor may be a limited executor, with reference to the place in which he is empowered to execute his trust; as if a testator should make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those in

LIMITED EXECUTOR—continued.

Somerset. Went. Off. Ex. 291, 4th ed.; Bro. Executors, 2, 155, cited in 1 Wms. Ex. 181.

LIMITED LIABILITY. The liability of the members of a Joint Stock Company (*see* that title) may be either unlimited (which it seldom is) or limited; and if the latter, then the limitation of liability is either the amount, if any, unpaid on the shares (in which case the limit is said to be *by shares*), or such an amount as the members guarantee in the event of the company's being wound up (in which case the limit is said to be *by guarantee*). Where the limit is by shares the memorandum of association must contain a declaration that the liability is limited, and the amount of the capital must be divided into shares of a fixed amount; and each member must take one share at least, and write the number he takes opposite to his name in the memorandum of association. On the other hand, when the liability is limited by guarantee, the memorandum must contain a declaration that in the event of the company being wound up each member will contribute towards the liabilities what may be required, not exceeding a specified amount.

The memorandum of association is to be registered with the registrar of joint stock companies; and with it articles of association signed by each member **MAY** in the case of a company limited by *shares*, and **SHALL** in all other cases, be delivered to the registrar. If the company be limited by guarantee, or unlimited, these articles must state the number of the shares where the capital is divided into shares, and the proposed number of the members where the capital is not so divided. The registrar retains and registers the memorandum and articles thus delivered to him, and certifies under his hand that the company is incorporated, and in the case of a limited company that it is limited, whereupon the subscribers of the memorandum, together with such persons as may from time to time become members of the company, are constituted a body corporate with perpetual succession, a common seal, and power to hold lands; and this certificate is conclusive evidence that the statutory requirements with respect to registration have been complied with. The unpaid-up capital is called up when wanted, or at certain agreed periods; the successive demands for it are thence technically described as *calls*.

LINEAL CONSANGUINITY. That relationship which subsists between persons each of whom is descended in a direct line from another, as between son, father,

LINEAL CONSANGUINITY—*continued.*

grandfather, great-grandfather, and so upwards in the direct ascending line, or downwards in the direct descending line.

See also title **CONSANGUINITY**.

LINEAL DESCENT. Descent in a right line, as where an estate descends from ancestor to heir in one line of succession.

See also title **DESCENTS**.

LINEAL WARRANTY: See titles **COLLATERAL WARRANTY**; **WARRANTY**.

LIQUIDATED DAMAGES are damages, the amount of which is fixed or ascertained, as opposed to unascertained or uncertain, *i.e.*, unliquidated, damages. It is frequently mutually agreed between the parties to a contract that the one shall pay to the other some specified sum of money in the event of a breach of the contract; and in such a case it frequently becomes a nice question whether such sum is to be considered in the nature of a penalty merely for the purpose of covering the damages which one party may sustain in the event of a breach committed by the other, or whether the full sum specified is to be actually paid to the injured party as liquidated or settled damages, without reference to the extent of the injury sustained. See *Kemble v. Farren*, 6 Bing. 141; *Reilly v. Jones*, 1 Bing. 202; Ch. on Contr. 863, 864.

And see title **DAMAGES**.

LIQUIDATION. Under the Bankruptcy Act, 1869, a person in embarrassment, instead of suffering himself to be made a bankrupt, may (under s. 125) summon a meeting of his creditors and prevail with them by special resolution to declare that his affairs shall be liquidated by arrangement. A trustee is thereupon appointed, with or without a committee of inspection; and when that is done the general provisions of the Act applicable to the proof of debts, &c., in the case of bankruptcy are made applicable to the proof of debts, &c., in the liquidation. "The property of the liquidating debtor vests in his trustee, who has the like powers as a trustee in bankruptcy. The close of the liquidation and the discharge of the liquidating debtor depend upon the creditors, who may make a resolution to that effect in a general meeting. The next two sections of the act (ss. 126, 127) relate to a debtor making a *Composition* with his creditors, which avoids both bankruptcy and liquidation, and may be carried by an extraordinary resolution of a majority in number and three-fourths in value of the creditors.

See titles **BANKRUPTCY** and **COMPOSITION**.

LIQUIDATOR: See title **WINDING-UP**.

LIS PENDENS. This phrase denotes a suit or action depending, *i.e.*, in course. Inasmuch as every such suit or action would, when decided, naturally affect the land according to its result in whosever hands the land might be at the date of the decision, it was enacted by the 2 & 3 Vict. c. 11, s. 7, that no *lis pendens*, unless or until the same was registered, and duly re-registered, should bind a purchaser or mortgagee not having express notice thereof. By the stat. 13 & 14 Vict. c. 35, s. 17, a special case to which appearances have been entered is made a *lis pendens*. Lastly, by 30 & 31 Vict. c. 47, s. 2, if a suit or action is not prosecuted in a *bona fide* manner, the Court may order the registration of it as a *lis pendens* to be vacated, and that even without the consent of the person registering the same.

LIVERY. During the existence of the feudal tenures and customs, the male heir when he arrived at the age of twenty-one years, or the heir female at the age of sixteen, might sue out a writ of livery or *ouster le main*; that is, the delivery of their lands out of their guardian's hands; for in the feudal times the lord was entitled to the wardship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir till he or she attained the age of twenty-one if a male, or sixteen if a female (2 Inst. 203). This guardianship was not subject to account.

See also next title.

LIVERY OF SEISIN. This simply means delivery of the land (*traditio*). It is of two kinds, being either in deed or in law.

(1.) Livery in deed, *i.e.*, in fact or act, was performed by delivery of a part of the actual thing in lieu, and as a symbol of, the whole, *e.g.*, by delivery of the ring of a door, or of a branch of a tree, or a turf of the ground, accompanied with these or the like words spoken by the feoffor: "Here I deliver you seisin of this house or land" [*as the case might be*], "in the name of the tenements contained in this deed, and according to the form and effect thereof." And thereupon the feoffee entered upon or took possession of the house or land. A separate livery was wanted for lands in several counties. Livery in deed could only be made to the feoffee personally.

(2.) Livery in law, *i.e.*, constructive or implied delivery of the actual thing. This was done off the land but in sight of it, the feoffor saying these or the like words: "I give you yonder land, enter and take possession;" and if the feoffee thereupon or at any time thereafter during the life of

LIVERY OF SEISIN—*continued.*

the feoffor entered upon the land, the livery was good, but otherwise it was void. One such livery sufficed for various counties. Livery in law might be made either to the feoffee personally, or to his lawfully constituted attorney. *Wms. R. P.* 138-9.

LLOYD'S BONDS. These are acknowledgments by a borrowing company under its seal of a debt incurred and actually due by the company to a contractor or other person for work done, goods supplied, or otherwise, as the case may be, with a covenant for payment of the principal and interest at a future time. These are valid securities, if issued *boni fide*, and not a mere device for evading the provisions of the Acts regarding companies forbidding them to borrow money, unless in repayment of the existing debt of the company. See *Godefroi and Shortt*, 39.

LOCAL ACT OF PARLIAMENT. Such an Act as has for its object the interest of some particular locality; as the formation of a road, the alteration of the course of a river, the formation of a public market in a particular district, &c. See 1 *M. & W.* 520.

LOCAL ACTION. An action is termed local when all the principal facts on which it is founded are of a local nature, as where possession of land is to be recovered, or damages for an actual trespass, or for waste affecting land, or for any other kind of injury affecting real property, because in such a case the cause of action relates to some particular locality, which usually also constitutes the venue of the action. But under the Judicature Act, 1873, there is to be no local venue for the trial of any action (*Sch. r. 28*).

See also titles **TRANSITORY ACTION**;
VENUE.

LOCUS IN QUO. The place in which the cause of action arose, or where anything is alleged to have been done, in pleadings is so called (1 *Salk.* 94). The phrase is almost peculiar to actions of trespass *quare clausum, fregit*.

LODGER: See title **ELECTORAL FRANCHISE.**

LODGING-HOUSES. The keeper of a lodging-house is not liable (as an inn-keeper) for the loss of the goods brought by a lodger to her house, provided she be not guilty of a positive misfeasance. *Holder v. Soulby*, 8 *C. B. (N.S.)* 254.

LODGINGS. A person who lets lodgings impliedly warrants that they are

LODGINGS—*continued.*

reasonably fit for habitation (*Smith v. Marable*, 11 *M. & W.* 5). Since the stat. 34 & 35 *Vict. c. 79*, a lodger's goods cannot be distrained for the rent owing from his landlord to the superior landlord. A contract for mere lodgings is always determinable upon notice by either party to the other, a week's notice being that usually given in the absence of any special agreement; and this rule is not altered although the rent should not be paid by the week, but by longer periods. *Right v. Darby*, 1 *T. R.* 159.

LONG PARLIAMENT, ACTS OF. This Parliament assembled in 1640-1, and was never formally dissolved. The stat. 4 *Edw. 3, c. 14*, had enacted that Parliament should meet every year or oftener if need were; but this Act, which had been little regarded by any sovereign, was most egregiously disregarded by Charles I. Accordingly, the Long Parliament now enacted its famous Triennial Bill, providing that Parliament, if not actually then sitting, should be *ipso facto* dissolved at the expiration of three years from the first day of its session, and the chancellor was to issue new writs within three years from the dissolution; and in case no such writs were issued within that time, the peers were to assemble of themselves at Westminster and to issue writs to the sheriffs requiring them to summon representatives of the Commons; and in case the Peers failed to do so, the sheriffs of their own accord, or (in their default) the electors themselves, were to proceed to the new elections. This Triennial Act was repealed upon the restoration of Charles II., and is to be distinguished from the Triennial Act so called *par éminence* (6 *W. & M. c. 2*).

The other legislative Acts of the Long Parliament were the following:—

(1.) They annulled the judgment against Hampden in the case of *Ship Money*, and declared ship-money and also the taxes of Charles I. on foreign merchandise illegal;

(2.) They abolished the Court of Star Chamber; also, the Court of High Commission; also, the Court of the President and Council of the North; also, the Court of the President and Council of Wales; also, the Courts of the Duchy of Lancaster and of the County Palatine of Chester;

(3.) They declared it illegal to *impress* his majesty's subjects, or to compel them to go out of the country to serve in foreign wars;

(4.) They passed an Act declaring that they could not be dissolved without their own consent;

(5.) They abolished Episcopacy and established Presbyterianism;

LONG PARLIAMENT, ACTS OF—*contd.*

(6.) They deprived the king of the control of the militia and forces, and assumed that control to themselves, and eventually they laid *nineteen propositions* before the king, of which the principal were the following:

- (a.) That privy councillors and officers of state should be approved in Parliament;
- (b.) That the education and marriage of the king's children should be under the control of Parliament;
- (c.) That the militia and forces and all fortresses and magazines should be given up to the nominees of Parliament;
- (d.) That all judges should hold office during good behaviour; and,
- (e.) That all popish lords should be deprived of their votes.

LORD CHANCELLOR: *See* title CHANCELLOR.

LORD MAYOR. The chief officer of the Corporation of the City of London is so called. The origin of the appellation of "Lord," which the Mayor of London enjoys, is attributed to the fourth charter of Edward III., which conferred on that officer the honour of having maces, the same as royal, carried before him by the serjeants. He is annually nominated and elected by the livery from amongst such of the aldermen as have served the office of sheriff. In his character of chief magistrate of the City, the Lord Mayor presides at the Court of Aldermen in the Inner Chamber, the Court of Common Council, and the Court of Common Hall; and as such issues his precept for the holding of any of these courts. He is also nominally President of the Court of Aldermen in the Outer Chamber (or Lord Mayor's Court). He is chairman of every committee which he attends; also of the commissioners of sewers, and has power to summon them to a public meeting whenever he thinks proper (11 Geo. 3, c. 29, s. 6). The corporation provide the Lord Mayor with the Mansion House, which they keep in repair at their own expense, and annually grant a sum of money amounting to nearly £8000, and also provide various officers at their own expense to support the dignity of the office. Pulling's Laws and Customs of the City and Port of London.

LORD MAYOR'S COURT. This is a Court of Record, of Law and Equity, and is the chief court of justice within the corporation of London. Its legal style is "The Court of our Lady the Queen, holden before the Lord Mayor and Aldermen in the Chamber of the Guildhall of the City of

LORD MAYOR'S COURT—*continued.*

London." In legal consideration and in conformity with the style of the Court, the Lord Mayor and Aldermen are supposed to preside; but the recorder is in fact the acting judge. All persons, as well freemen as non-freemen, not being under any general incapacity which would disable them from suing in the superior Courts at Westminster, may sue in this Court. As a Court of Common Law it has cognizance of all personal and mixed actions arising within the City and liberties, without regard to the amount of the debt or damages sought to be recovered; and if the gist of the action arise within the City, the residence of the plaintiff or defendant therein is immaterial. Emmerson's City Courts; Pulling's Laws and Customs of the City and Port of London, 177, 2nd ed.; Brandon on Foreign Attachments, and Notes of Practice.

See also title ATTACHMENT, FOREIGN.

LORDS SPIRITUAL AND TEMPORAL.

The lords spiritual compose one of the constituent parts of our Parliament, and consist of two archbishops and twenty-four bishops; and by the Act of Union with Ireland (39 & 40 Geo. 3, c. 67) four Irish lords spiritual, taken from the whole body by rotation of sessions, were added, who ranked next after the spiritual lords of Great Britain; but under the stat. 32 & 33 Vict. c. 42, these Irish lords spiritual have ceased. The lords temporal consist of all the peers of the realm, by whatever title of nobility distinguished, and form another constituent part of our Parliament.

See also title PEERS.

LORD AND VASSAL. The fundamental maxim of all feudal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden either mediately or immediately from the Crown. The grantor was called the proprietor or lord, being he who retained the dominion or ultimate property of the feud or fee; and the grantee, who only had the use and possession, according to the terms of the grant, was styled the feudatory or vassal, which was only another name for the tenant or holder of the lands.

See titles ESTATES; FEUDAL SYSTEM; TENURE.

LORD'S DAY: *See* title SUNDAY.

LOT. Certain duties, tolls, assessments, or impositions are frequently so termed.

See title LOT AND SCOT.

LOT AND SCOT (Sax. *Uot*, a chance or lot, and *scet*, a part or portion). Certain duties which must be paid by those who claim to exercise the elective franchise within certain cities and boroughs before

LOT AND SCOT—continued.

they are entitled to vote. It is said that the practice became uniform to refer to the poor-rate as a register of "scot and lot" voters, so that the term, when employed to define a right of election, meant only the payment by a parishioner of the sum to which he was assessed on the rate. *Rog. on Elec.* 198, 6th ed.; 1 *Dougl.* 129.

See also title **ELECTORAL FRANCHISE**.

LOTTERY. Lotteries have been frequently resorted to both by states and by individuals for the purpose of raising money, but they are proscribed by the morality and industry of England. They were declared a nuisance and prohibited by 10 & 11 Will. 3, c. 17; and even foreign lotteries are forbidden by the 6 & 7 Will. 4, c. 66, to be advertised in England. For an instance in which these laws have been put in force see *Allport v. Nutt*, 1 C. B. 974; and see title **WAGERING**.

LOUAGE. This is the contract of hiring and letting in French Law, and may be either (1) of things, or (2) of labour. The varieties of each are the following:—

(1.) Letting of things,—

(a.) *Bail à loyer*, being the letting of houses;

(b.) *Bail à ferme*, being the letting of lands;

(2.) Letting of labour,—

(a.) *Loyer*, being the letting of personal service;

(b.) *Bail à cheptel*, being the letting of animals.

LOYER: See title **LOUAGE**.

LUNACY is the common legal designation of insanity, or the state of being *non compos mentis*. The law takes notice of three degrees of lunacy: (1) Lunacy which exempteth in crime; (2) Lunacy which excuseth in contract; and (3) Lunacy which placeth the party and his property under the protection of the Crown.

Criminal lunacy may be either total or partial. And if total, than either natural (*dementia naturalis*), in which case it is termed *idiocy*, or accidental (*dementia accidentalis*), which may be either permanent or intermittent (*i.e.*, accompanied with "lucid intervals") or wilfully brought on by the party himself (*dementia affectata*), *e.g.*, in the case of drunkenness (see that title). If the lunacy be partial, then the criminal definition of it is that given in *R. v. M'Naghten* (10 Cl. & F. 200), where the judges advised the House of Lords to this effect, that notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some

LUNACY—continued.

public benefit, he was nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law.

With reference to contract law the rule is, that a lunatic is liable for necessities, and generally also on contracts executed of which he has had the advantage, notwithstanding they may not be for necessities at all (*Molton v. Camroux*, 4 Ex. 17); but that on all other contracts he is not liable at all, not even although at the time of contracting he betrayed no signs of lunacy, and the other contracting party was ignorant thereof.

With reference to the Chancellor and Lords Justices' jurisdiction in lunacy, this jurisdiction extends generally to persons not capable of managing their own affairs, and therefore are properly deemed of unsound mind, *non compos mentis*. This jurisdiction is now most commonly exercised under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), or where the property is of small amount, under the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86).

M.

MAGNA CHARTA. The great charter of English liberty granted by, or rather extorted from, King John, and afterwards, with some alterations, confirmed in Parliament by Henry III. and Edward I. It was called Magna Charta on account of its great importance, and partly in contradistinction to another charter (*Carta de Foresta*), which was granted about the same time. The provisions of this charter extend not only to the administration of justice (regulating the various jurisdictions, temporal and ecclesiastical), but also to the personal liberty of the subject, the limits of taxation of his property, the rights of foreign merchants within the realm, as well during peace as in times of war, and also the liberties and privileges of the church. It contains also numerous provisions of a purely temporary nature, intended to remedy the prevailing abuses of the times.

MAIDEN ASSIZE. When, at the assizes, no person has been condemned to die it is termed a "maiden assize."

MAIDEN RENTS. A fine paid by the tenants of some manors to the lord for a licence to marry a daughter. Cowel.

MAIHEM, or MAYHEM. The violently depriving another of the use of such of his members as may render him the less able,

MATHEM, or MAYHEM—*continued.*

in fighting, either to defend himself, or to annoy his adversary: *e.g.*, the cutting off, or disabling, or weakening a man's hand or finger, striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are considered as mayhems: hence, to do a person such an external injury as merely detracts from his personal appearance is not considered as mayhem, because it does not weaken him, but only disfigures him. 1 Hawk. c. 44.

MAINPRISE (from the Fr. *main*, hand, and *prendre*, to take). One of the means of remedying the injury of false imprisonment was by a writ called a writ of mainprise, directed to the sheriff (either generally, when any man was imprisoned for a bailable offence, and bail had been refused: or specially, when the offence or cause of commitment was not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called mainpernors, and to set him at large. Mainpernors differ from bail, in that a man's bail may imprison or surrender him up before the stipulated day of appearance: whereas mainpernors can do neither, but are simply sureties for his appearance at the day: bail are only sureties that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever. The word mainprise is used in various ways; thus when a man is committed to those who undertake he shall appear at the appointed day (*i.e.*, to his mainpernors), he is said "to be let to mainprise;" and a man who may be so mainprised or delivered to mainpernors is said to be mainprisable. Where an offence was not bailable, the justices were frequently, by Act of Parliament, directed "to commit such offender or offenders to the common gaol of the county, there to remain without bail or mainprise." 43 Eliz. c. 2, s. 4; Dyer, 272 (31); 4 Inst. 179.

See also title BAIL.

MAINTENANCE. This word has various senses.

(1.) It designates an offence bearing a near relation to barratry, and which consists in officiously intermeddling in a suit that in no way belongs to one, as by maintaining or assisting either party with money, or otherwise taking great pains to assist the plaintiff or defendant in the suit, although having nothing to do with it. *Les Termes de la Ley*; *Findon v. Parker*, 11 M. & W. 675.

(2.) In another sense, it denotes the provision made, either by deed or will, or by

MAINTENANCE—*continued.*

order of the Court of Chancery, for the support and bringing up of children during their minorities. The Court is now able, in a proper case, to make the requisite order on summons, without bill filed.

See title INFANTS.

MALA IN SE (*evils in themselves*).

All things which are evil in themselves are so termed, in contradistinction to those things which are not evil in themselves, but are only forbidden by the laws, and which are therefore called *mala prohibita*, or forbidden evils, and sometimes *mala quia prohibita*, to indicate that they are evils by reason of the prohibition only.

MALA PROHIBITA: See title MALA IN SE.

MALICE (*malitia*). In its legal sense, this word does not simply mean ill-will against a person: but signifies a wrongful act, done intentionally, without just cause or excuse. Thus, if I intentionally and without just cause or excuse gave a perfect stranger a blow likely to produce death, I should, in legal contemplation, do it of malice, because I did it intentionally, and without just cause or excuse. So, if I maim cattle, even without knowing whose they are, I should, in legal construction, do it of malice, because it would be a wrongful act, and be done intentionally, without cause or excuse. See *per* Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255. Malice is regarded under the following varieties of aspect:—

(1.) Malice in Law,—being that species of it which is described above; and

(2.) Malice in Fact, which again presents two sub-varieties, viz:—

(a.) Personal malice, *i.e.*, spite, against some particular individual; and

(b.) Malice against the world generally, without reference to any particular individual, *e.g.*, where a person throws a bottle of vitriol over a wall into the public street or highway, not knowing or caring who is passing in the street or on the highway at the time.

MALICE PREPENSE (from the Latin *malitia*, malice, and the Fr. *penser*, to think, and *pre*, beforehand.) Malice aforethought, *i.e.*, deliberate, predetermined malice. 2 Roll. Rep. 461.

MALICIOUS PROSECUTION. A person who has been unjustly prosecuted for any crime, or who has causelessly been made a bankrupt, may bring an action for a malicious prosecution against the prosecutor or the petitioner as the case may be; but for the success of his action, he must

MALICIOUS PROSECUTION—*continued.*

prove two things :—(1.) The fact of malice ; and, (2.) The absence of all reasonable or probable cause for the defendant's conduct. The action for a malicious arrest stands on the like footing, but can hardly occur at the present day, imprisonment as well on *meeme* as on final process having been abolished.

MANDAMUS. This is either (1) the prerogative writ so called, or (2) the ordinary writ of injunction. The prerogative *mandamus* is a writ which issues in the king's name out of the Court of King's Bench, commanding the completion or restitution of some right. The power of issuing writs of *mandamus* is one of the highest and most important branches of the jurisdiction of the Court of King's Bench, and in general belongs exclusively to that Court ; and it may be compared to a bill in Equity for a specific performance. It is used principally for public purposes, and to enforce the performance of public rights or duties. A writ of *mandamus*, however, does operate in affording specific relief, and enforcing some private rights when they are withheld by a public officer, and though principally for the admission or restitution to a public office, yet it extends to other rights of the person or property. A *mandamus* is not generally granted by the Court, excepting when the party applying for it has no other specific remedy. It issues to compel a removed clerk to deliver up books of a public corporate company, to compel overseers to deliver up parish books to their successors ; to compel a lord and steward of a copyhold manor to admit the tenant ; it also issues to inferior Courts and judges thereof, and justices of the peace and other public functionaries, to compel them to proceed according to their respective duties. There was also a *mandamus* formerly much in use which issued to the escheator for the finding of an office after the death of one who had died the king's tenant, and was the same as the writ of *diem clausit extremum*, excepting that the *diem clausit extremum* went out within a year after the death, whereas the *mandamus* did not go out till after the year, and when no *diem clausit extremum* had previously been sued out, or had been sued out to no effect. 1 Chitt. Gen. Pract. of the Law ; *Les Termes de la Ley* ; C. L. P. Act, 1854, ss. 75-77.

The ordinary *mandamus* is to all intents and purposes an injunction (*see* that title), and issues under the provisions of the C. L. P. Act, 1854 (ss. 68-74) to compel the defendant in an action to perform any duty, being of a public character, in which the plaintiff has an interest.

MANDAT. In French Law is the *mandatum* of Roman, and the *Gratuitous bailment* of English Law.

See title **BAILMENT**.

MANDATE (*mandatum*). A contract by which one employs another to act for him in the management of his affairs, or in some particular department of them, of which employment the person accepts and agrees to act. He who so gives the employment is called the *mandator*, and he who accepts it the *mandatarius*. The word was also sometimes used to signify a judicial command of the king or any of his justices to have anything done for the benefit and dispatch of justice, and appears to have been somewhat analogous to the writ of *mandamus*. Cowel.

MANNER AND FORM (*Modo et formâ.*)

Formal words introduced at the conclusion of a traverse ; and their object is to put the party whose pleading is traversed, not only to the proof that the matter of fact denied is in its general effect true as alleged, but also that the manner and form in which the fact or facts are set forth are also capable of proof. Thus in an action of assumpsit, where the plaintiff sets out an agreement in his declaration, as the foundation of the defendant's promise, and the defendant pleads generally that he did not promise in manner and form as alleged, he may, under the issue so raised, take advantage of any material variance between the contract so set out and that which, upon the trial, is proved to have been the actual contract between the parties. It may be as well, however, to remark, that when a traverse is pointed to one amongst several independent allegations, it simply puts in issue the substance of that allegation notwithstanding the words *modo et formâ*. So in the common action of debt for goods sold and delivered, when the defendant pleads that he never was indebted in manner and form as alleged, this traverse does not put in issue the formal accuracy of the plaintiff's statement, but the very substance of the plaintiff's declaration, viz., whether or not the defendant was ever indebted to the plaintiff in respect of the cause of action alleged. *See* Steph. Pl. 214, 215, 4th ed. ; Neale & McKenzie, 2 Cr. M. & R. 67 ; 1 Ch. Pl. 513.

MANOR (*manerium*.) A manor seems to have been a district of ground held by great personages. It is compounded of various things, as of a mansion-house, arable land, pasture, meadow, wood, rent, advowson, court baron, and such like. A manor, to be such, must have continued from time immemorial ; for at the present day, or since the *stat. Quia Emptores*
Q

MANOR—*continued.*

(18 Edw. 1, c. 1), a manor cannot be made, because the process of subinfeudation has been abolished, and a Court Baron cannot now be made, and a manor cannot exist without a Court Baron, and suitors and freeholders to the amount of two at the least; for if all the freeholds except one escheat to the lord, or if he purchase all except one, his manor is at once gone and dead. A manor by reputation, however, but which has ceased to be a legal manor, by defect of suitors to the Court, may yet retain some of its privileges, as a preserve for game, and the lord may still appoint a game-keeper thereto. *Les Termes de la Ley*; Watkins on Copyholds.

With reference to the legal content of the word manor, it seems that without the addition of the word "appurtenances," it will pass the following properties, viz:—

- (1.) The demesnes, i.e., the lands of which the lord is seized within the manor.*
- (2.) The freehold of all the lands held by copyhold or other customary tenants;
- (3.) The wastes;
- (4.) Fealty, suit of Court, rents, and generally all the services;
- (5.) Courts Baron with fines and perquisites annexed thereto;
- (6.) Courts Leet, with the like fines and perquisites;
- (7.) Franchises; and
- (8.) Advowsons appendant.

Many manors which have been destroyed are still reputed manors, and will pass in a deed by the description of manor.

MANSLAUGHTER. Is a criminal offence; it is defined as homicide felonious, but without premeditation; and it may be either (a) involuntary, as where a man doing an unlawful act not amounting to felony by accident kills another, or where by culpable neglect of duty he occasions another's death; or (b) voluntary, as when upon a sudden quarrel, two persons fight, and one of them kills the other, or where a man greatly provokes another by some personal violence and the other immediately kills him.

MANUMISSION (*manumissio*). The making a bondman free, which in the feudal ages was a frequent occurrence. Manumission was either express or implied. Manumission express was done by the lord granting to his vassal a deed of enfranchisement. Manumission implied,

MANUMISSION—*continued.*

was done by the lord entering into an obligation with his vassal to pay him money at a certain day, or granting him an annuity, or leasing lands to him by deed for a term of years, or doing any other similar act which would imply that he treated with his vassal upon the footing of a freeman (*Les Termes de la Ley*). Similar modes of dealing with a *seruus* had in Roman Law the like effect of an implied manumission; and in particular the mere circumstance of the master describing his slave in a written document as his son (*filius*) had the effect of rendering him a freeman, although not a son. Just. Inst. i. 11, 12.

MARITAGIUM. Was the wife's portion in English Law and the *dos* of Roman Law, and is to be distinguished from *matrimonium*, which was land inherited from one's mother. It also signified the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. It is also said to have been that profit which might accrue to the lord by the marriage of one under age who held his lands of him by knight service. Cowel.

MARKET. In its legal signification may be defined to be the liberty or privilege by which a town or lord is enabled to keep a market (Old Nat. Brev. 149. See also title FRANCHISE). The Market and Fairs Clauses Act (10 & 11 Vict. c. 114) consolidates in one Act the provisions usually contained in special Acts for constructing and regulating fairs and markets; and under the stat. 31 & 32 Vict. c. 51, the usual days for holding fairs, if inconvenient, may on representation to the Home Secretary be altered, a notice of the alteration being published in the *Gazette*. The fairs of the metropolis are regulated by the stats. 2 & 3 Vict. c. 47, and 31 & 32 Vict. c. 106. No one may place a stall in a market without leave from the owner of the soil (*Northampton (Mayor) v. Ward*, 1 Wils. 107). and trespass will lie for so doing. *Norwich (Mayor) v. Swan*, 2 W. Bl. 1116.

See also next title.

MARKET OVERT (*open market*). Selling goods in market overt means selling them in an open market, as opposed to selling them privately or in a covert place; the former kind of sale effects a change in the property of the things so sold, even as against the true owner, e.g., in the case of stolen goods; but a sale out of market overt does not. In the country, the market-place or spot of ground set apart by custom for the sale of goods and

* But demesnes previously granted in fee do not, on a repurchase of them by the lord, become part of the manor again, as they would do upon an escheat, *Delacherois v. Delacherois*, 11 H. L. C. 62.

MARKET OVERT—*continued.*

wares, &c., is, in general, the only market overt. In London, however, a sale in an open shop of proper goods, is equivalent to a sale in market overt; for every day, except Sunday, is a market there. So it would appear is the case in Bristol, or elsewhere, when warranted by custom. Dub. Mo. 625; 5 Co. 83 c; cited in Com. Dig. tit. Market (E). And see generally the *Case of Market Overt*, Tud. L. C. Mer. Law, 713.

MARKSMAN. A deponent in an affidavit who cannot write his name, but makes his mark or cross instead, is so termed (2 Q. B. 520, n. (a); 4 Dowl. P. C. 765). The proof of such a signature by comparison of handwriting is excluded a mark not presenting sufficient data of comparison.

MARQUE AND REPRISAL, LETTERS

OF. These words "marque and reprisal," are frequently used as synonymous; but taken in their strict etymological sense, the latter signifies a taking *in return*; the former, the passing the frontiers (*marches*) in order to such taking. Letters of marque and reprisal are grantable by the law of nations, whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs; and the party to whom these letters are granted may then seize the bodies or the goods of the subjects of the state to which the offender belongs, until satisfaction be made, wherever they happen to be found. Reprisals are to be granted only in case of a clear and open denial of justice. They are regulated in England by the stat. 4 Hen. 5, c. 7. They are of course granted only in times of peace, and for a cause which is not sufficient to provoke an actual war between the two countries. But at the present day, in consequence partly of treaties and partly of the practice of nations, the making of reprisals is confined to the seizure of commercial property on the high seas, by public cruisers, or by private cruisers specially authorized thereto.

See also title **PRIVATIZING**.

MARRIAGE. The law of marriage depends partly on statute and partly on the Common Law. The most important statute upon the subject was the 26 Geo. 2, c. 33 (Lord Hardwicke's Act), by which the publication of banns, and the solemnization in one of the churches where they had been published, were required; and that statute also enacted that two witnesses besides the minister should be present, and that the register should be signed by the minister, parties, and witnesses. This statute, referring only to the formalities of the mar-

MARRIAGE—*continued.*

riage, was strictly territorial or local (see title **LEX LOCI ACTUS**), whence Gretna Green marriages were valid (*Brook v. Brook*, 9 H. L. C. 193). The stat. 3 Geo. 4, c. 75, declared marriages of infants by licence, without consent, valid. The stat. 6 Geo. 4, c. 92, and other subsequent statutes, provide for the validity of marriages celebrated in churches and chapels in which banns have not been usually published. And under other statutes, commencing with the stat. 6 & 7 Will. 4, c. 85, marriages by or without licences may be solemnized by virtue of the superintendent registrar's certificate.

By the Common Law of England the requisites to the validity of marriage, are the following:—

- (1.) The presence of a priest in holy orders (*Catherwood v. Caslon*, 13 M. & W. 261; *Reg. v. Millis*, 10 Cl. & F. 531);
- (2.) The presence of witnesses (*Beamish v. Beamish*, 9 H. L. C. 274), or at least of one witness (*Wing v. Taylor*, 2 S. & T. 278);
- (3.) The consent of the parties (*Harrod v. Harrod*, 1 K. & J. 4);
- (4.) The formalities of marriage as defined by the *lex loci actus* must be observed (*Brook v. Brook*, 9 H. L. C. 193);
- (5.) The essentials of marriage, as defined by the *lex domicilii*, including therein all questions of personal capacity or incapacity, must be observed (*Brook v. Brook*, *supra*);
- (6.) The parties must not be within the prohibited degrees of consanguinity or of affinity; and for that purpose illegitimate relationship counts; but
- (7.) The consent of the parents is not necessary (*Rez v. Birmingham*, 2 M. & R. 230).

See also title **HUSBAND AND WIFE**.

MARRIAGE, BREACH OF PROMISE

OF. The promise, to support an action, must have been made to the plaintiff (*Cole v. Cottingham*, 8 C. & P. 75.) Moreover, it must appear not only that the defendant proposed or even promised to marry the plaintiff, but also that she promised to marry him; for in this as in all other cases of contract mutuality is an essential requisite (see title **CONTRACT**) (*Veneall v. Veneas*, 4 F. & F. 344). The C. L. P. Act, 1852, Sch. B, provides simple counts for this action, suitable to the circumstances of the generality of cases. With reference to the evidence of the promise, the parties themselves, although formerly incompetent as witnesses (14 & 15 Vict. c.

MARRIAGE, BREACH OF PROMISE OF—continued.

99, s. 4), were made competent by the stat. 32 & 33 Vict. c. 68. Various defences may be raised to the action, e.g., (1.) General bodily infirmity arising subsequently to the contract (*Atchinson v. Baker*, Peake's Add. Ca. 103), not being, *semble*, mere infirmity arising from disease (*Hall v. Wright*, El. Bl. & El. 746); (2.) Prior unchastity of the female, not discovered until after the contract (*Wharton v. Lewis*, 1 C. & P. 529); and (3.) Mutual releases (*Davis v. Bomford*, 6 H. & N. 245).

MARRIAGE SETTLEMENTS. These are settlements made on marriage, either by the parties themselves to the marriage contract or one of them, or by some parent or other relation of the parties, or of one of them on their behalf. Such settlements if made before marriage are called ante-nuptial, if made after the marriage, are called post-nuptial: and there is this broad distinction between ante-nuptial and post-nuptial settlements, that the former are equivalent to purchases for value, while the latter are considered as voluntary conveyances only, and the respective natural effects of that distinction attach to the respective settlements. Consequently, an ante-nuptial settlement receives the like favour in Equity and also at Law which a purchase for value receives, while a post-nuptial settlement is subject to the like liabilities to be defeated both in Equity and at Law which every voluntary settlement is subject to (see titles VOLUNTARY SETTLEMENTS; VALUE, PURCHASE FOR). Two rules, however, have been established, which partially favour post-nuptial settlements above purely voluntary settlements, namely:—

(1.) If the slightest addition of value, not notoriously colourable, is added to the meritorious consideration of blood or natural affection, which already underlies the settlement, then the post-nuptial settlement is taken out of the category of voluntary settlements altogether, and is placed in the category of settlements for value, with all the corresponding incidents of advantage attaching to the latter (*Hewison v. Negus*, 16 Beav. 594); and

(2.) If the post-nuptial settlement has been preceded by marriage articles entered into previously to the marriage, then the post-nuptial settlement relates back to the date of the articles, and becomes practically ante-nuptial, or equivalent to a settlement for value; and it does not matter whether the articles are in writing or rest in parol merely (*Dundas v. Dutens*, 2 Cox, 235; *Warden v. Jones*, 2 De G. & J., 76); the subsequent settlement in writing sup-

MARRIAGE SETTLEMENTS—contd.

plying in the latter case, before any action has arisen, the original defect of writing. *Bailey v. Sweeting*, 9 C. B. (N.S.) 843; *Bill v. Bament*, 9 M. & W. 40.

Also, by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91, the following provisions have been made with reference to post nuptial settlements by traders:—

I. With reference to the husband's property in his own right,—

(1.) Any post-nuptial settlement made within two years of the subsequent bankruptcy of the trader is *ipso facto* void upon the bankruptcy; and

(2.) Any post-nuptial settlement made within ten years of the subsequent bankruptcy of the trader, and outside of the first two years thereof, is also void upon the bankruptcy, until proof of *bona fides*.

II. With reference to the husband's property in right of his wife,—

(3.) Any post-nuptial settlement by a trader on his wife and children is good, notwithstanding the bankruptcy, if the property have accrued during the coverture.

Also, by the same Act, and the same section thereof, it is provided, that, with reference to covenants and contracts made before marriage by a trader to settle future property, yet to acquire, all such covenants and contracts shall be void upon the trader's bankruptcy, unless prior to such bankruptcy the property referred to has been both acquired and settled pursuant to the covenant or contract. *Ex parte Bishop*, *In re Tönnies*, W. N. 1873, pp. 81, 125.

Assuming that a marriage-settlement is ante-nuptial, or (although post-nuptial,) is for any one or more of the foregoing reasons, valid, the following question arises upon it, namely, what is the extent of the marriage consideration. The general rule is, that the consideration of marriage supports only limitations to the intended husband and wife and the expected issue, and not limitations to any other persons (*Johnson v. Legard*, 6 M. & S. 60); but to this rule there are two exceptions, namely,—

(a.) Settlements made previously to and in contemplation of a second marriage, upon the issue of a former marriage (*Clarke v. Wright*, 6 H. & N. 849); and

(b.) Settlements made previously to, and in contemplation of, a first marriage upon the issue of either of the marrying parties by a future marriage. *Jenkins v. Kaymie*, 1 Lev. 150; *Clayton v. Wilson*, 3 Mad. 302.

There is also, speaking with a rough accuracy only, a third exception, namely,—

(c.) Settlements made upon collaterals,

MARRIAGE SETTLEMENTS—cont.

if there is any person purchasing on their behalf; but the validity of such limitations to collaterals clearly depends upon the money consideration and not on the marriage consideration alone. *Heap v. Tonge*, 9 Hare, 90.

The peculiarity which attaches to marriage as a consideration is this, that, unlike other considerations, when the marriage consideration has once had effect, the parties cannot be remitted to their original positions, the consideration not admitting, like a money sum, of being repaid or returned. The law regards the consideration of marriage in a sacred light. Where, therefore, the sacredness of marriage is made a mere pretext for committing a fraud, as where a trader who has been already living in concubinage with a woman marries her on the eve of his bankruptcy, and previously to such marriage settles all or a material part of his property on her, and his expected issue by her, the marriage consideration being clearly fictitious will be disregarded by the Court, and the settlement, although it is ante-nuptial, will be set aside upon the trader's bankruptcy, or as against his creditors (*Columbine v. Penhall*, 1 Sm. & Giff. 228; *Bulmer v. Hunter*, L. R. 8 Eq. 46), the wife being in such cases presumed to have notice of the husband's embarrassment,—a presumption which perhaps, would hardly be rebuttable by evidence.

MARSHAL. There are, or used to be, several officers of this name, but those which are more particularly connected with law are, (1.) The marshal of the king's house or knight marshal, whose special authority is in the king's palace, to hear and determine all pleas of the Crown, and to punish all faults committed within the verge, and to hear and judge of suits between those of the king's household; (2.) The Marshal of the Queen's Prison, who, previously to the stat. 5 & 6 Vict. c. 22, was called the Marshal of the King's Bench Prison, and had the custody of the King's Bench Prison; (3.) The Marshal of the Exchequer, to whose custody that Court committed the king's debtors for securing payment of their debts, and who also assigned sheriffs, escheators, customers, and collectors their auditors, before whom they had to account. *Fleta*, lib. 2, c. 4, 5; *Cowel*.

MARSHALLING OF ASSETS. As it is right that every claimant upon the assets of a deceased person should be satisfied (if his claim be just) so far as that object can be effected by any arrangement consistent with the nature of the respective claims of

MARSHALLING OF ASSETS—contd.

the creditors in general; it has been long a general principle of Equity that if a claimant has two or more funds to which he may resort, a person having an interest in one only of such funds has a right to compel the former to resort to the other or others of them, if that is necessary for the satisfaction of both. This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund. Thus, where A., a creditor, can resort to more than one fund of the deceased, and B., another creditor, can resort to only one, then in such case A. shall resort to that fund on which B. has no claim, and thus both will be satisfied; and this is termed marshalling of assets.

The question who are entitled to marshal, and against whom, is one of very considerable complexity, but may be conveniently explained in the following manner:—

Upon referring to the title ADMINISTRATION or ASSETS, it will be seen that there is an order usually observed in applying the properties which are applicable in payment of debts; now, by substituting in the same order the various persons to whom these various properties would go if there were no debts to pay, and to whom they do go so far as they are not exhausted by that payment, we obtain the following list of persons entitled to participate in the property of the deceased, viz.:

- (1.) Next of kin;
- (2.) Heir-at-law;
- (3.) Heir-at-law;
- (4.) Charged devisees and charged legatees;
- (5.) Uncharged pecuniary legatees, and uncharged residuary devisees;
- (6.) Uncharged specific devisees, and uncharged specific legatees; and
- (7.) Appointees.

Now the general rule of marshalling is this, That if any person in the above list is disappointed of his benefit under the will through the creditor seizing upon (as he may) the fund intended for him, such disappointed person may recoup or compensate himself for that disappointment by similarly going against the fund intended for and disappointing in his turn any one or more of the persons prior in the above list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them; so that eventually the next of kin have to bear the disappointment which was occasioned by the act of the creditor. Moreover, persons who stand in the same position in the above list, may

MARSHALLING OF ASSETS—continued.

have contribution (if not compensation) as against each other. But no one has any right to compensation as against persons posterior to himself in the above list.

See also title **ADMINISTRATION OF ASSETS.**

MARSHALSEA. The court or seat of the marshal of the king's house. This Court was originally held before the steward and marshal of the king's house, and was instituted to administer justice between the king's domestic servants, in order that they might not be drawn into other Courts, and thus deprive the king of their services. This Court latterly merged into the *palace court* (*curia palatii*) which was erected by King Charles I. to be held before the steward of the household and knight marshal, and the steward of the Court or his deputy, with jurisdiction to hold pleas of all manner of personal actions which should arise between any parties within twelve miles of the king's palace at Whitehall. The Court was held once a week, together with the ancient Court of Marshalsea, in the borough of Southwark, and a writ of error lay from there to the Court of King's Bench. The business of this Court has of late years much decreased, owing to the new Courts of request or conscience and the County Courts that have since been established. The word "Marshalsea" is also sometimes taken for the prison belonging to the Court of Queen's Bench, commonly called the Queen's Bench Prison, but by 5 Vict. c. 22, the style of it is changed to the Queen's Prison.

See title **MARSHALSEA PRISON.**

MARSHALSEA PRISON. This prison, which was also styled the Prison of the Marshalsea of Her Majesty's Household, was a prison for debtors, and for persons charged with contempt of Her Majesty's Court of the Marshalsea; the Court of the Queen's Palace of Westminster, commonly called the Palace Court, and the High Court of Admiralty; and also for Admiralty prisoners under sentence of courts martial. By 5 Vict. c. 22, this prison, the Fleet, and the Queen's Bench, were consolidated under the title of the Queen's Prison. See 5 Vict. c. 22; 6 Jur. 254.

MARTIAL LAW. The law which is properly designated Martial Law consists of no settled code, but of the will and pleasure of the king or his lieutenant; for in the time of war, on account of the great necessity there is for guarding against dangers that often arise, and which require immediate attention, the king's power is absolute and his word is law. Neverthe-

MARTIAL LAW—continued.

less, martial law in that sense does not exist in time of peace (*Grant v. Goult*, 2 H. Bl. 69, 100); and the law of Courts Martial, sometimes called Military and Naval Law, is to be distinguished from it as that law which governs soldiers and sailors as such in times of peace, and for the due administration of which there are special Courts military or Courts naval provided. Yet so jealous of these jurisdictions is the Common Law of England that they have continuance for one year only, being annually reconstituted by the Mutiny and Marine Mutiny Acts which are passed at the beginning of each session of Parliament.

MASTER. This is a name descriptive of various officers or offices in the law, several of which have in recent times been abolished. For a description of each, see the several particular titles following.

MASTER IN CHANCERY. The masters in Chancery were officers of that Court whose duty it was to make inquiries (when so required by the Court) into matters which, from the constitution of the Court, it could not conveniently, without the assistance of such officers, make for itself, and to report to the Court their findings or conclusions with respect to such matters. The duties of these masters were of a mixed character, being partly judicial, and partly ministerial, the powers which they possessed in both respects having been delegated to them by the Court. Whenever a master had acted in obedience to the directions of the Court, he used to inform the Court, by a document in writing, of what he had done, or what conclusion he had come to; and in most cases this document was called the master's report. The masters in Chancery, in addition to their ordinary functions, acted as messengers from the House of Lords to the House of Commons. Two attended the House in rotation each day, and sat on the wool-sacks, their duties consisting in carrying bills to the Commons which had been passed in the Lords, or in conveying any message which their Lordships might be desirous of communicating to the Commons. On arriving at the latter House they took their seats behind the chair of the sergeant-at-arms, and this officer, bearing the mace, walked up to the table and acquainted the Speaker that there was "a message from the Lords." The Speaker said, "Let the messenger be called in;" upon which the masters in chancery, accompanied by the sergeant-at-arms, approached the table, making their obeisances, and having deposited the bills thereon, or delivered their message, they

MASTER IN CHANCERY—*continued.*

retired with the same forms, walking backwards until they reached the bar of the House. There were also certain other officers of the Court of Chancery called masters extraordinary in Chancery; these were usually solicitors, who were appointed by the Court to act in the various counties of England in taking affidavits, acknowledgments of deeds, recognizances, &c., which otherwise would have had to be taken before the masters in London, and would thus have occasioned to the suitors loss of time and expense in coming to London for that purpose (Gray's Ch. Prac. 103). The duties formerly discharged by the masters in ordinary in Chancery are now discharged by the chief clerks attached to the offices of the various judges; those formerly discharged by the masters extraordinary are now discharged by solicitors qualified as commissioners for taking oaths throughout the kingdom.

MASTER OF THE FACULTIES. An officer under the Archbishop of Canterbury who grants licences and dispensations. He is mentioned in 22 & 23 Car. 2. Cowell.

MASTER OF THE ROLLS. One of the judges of the Court of Chancery; he is so called because he has the custody of the rolls of all patents and grants which pass the great seal, and also of the records of Chancery. He presides in a court called the Rolls Court, and his duties are assistant to those of the Lord Chancellor. He is first called Master of the Rolls in 11 Hen. 7, c. 18; but his office is as ancient as the Court itself. Unlike that of the Vice-Chancellors, his jurisdiction is in the nature of a distinct jurisdiction, which the suitor may for certain purposes, which are now considerably diminished, elect in preference to that of the Lord Chancellor.

MASTERS OF THE COURTS OF COMMON LAW. Each of the superior Courts of Common Law has five important officers attached to it, termed masters. These gentlemen are usually persons of consideration and learning, and are ordinarily members of the Bar. One of the masters of each Court always attends the sittings of his own Court in banco, and usually sits on the bench, appropriated for him and other officers, at the foot of the judicial bench. The Court of Error, also, is always attended by one of the masters. Their chief duties, when attending the Court, consist in taking affidavits sworn in Court, in administering oaths to attorneys on their admission, and in certifying to the Court, in cases of doubt or difficulty what the practice of the Court is. Their principal duties out of Court consist in taxing

MASTERS OF THE COURTS OF COMMON LAW—*continued.*

attorney's costs, in computing principal and interest on bills of exchange, promissory notes, and other documents, under rules to compute,—in examining witnesses who are going abroad, for the purpose of obtaining their testimony,—in hearing and determining rules referred to them by the Court in the place of the Court itself,—and in reporting to the Court their conclusions with reference to the rules so referred to them.

MASTER AND SERVANT. This is the relation which arises out of the contract of hiring. That contract may be either for an expressly defined period or for an indefinite or unexpressed period; but a general hiring, in the absence of any custom to the contrary is presumed to be a yearly hiring, and in all cases, a hiring at so much per month is a hiring for a year (*Fawcett v. Cash*, 3 N. & M. 177). In the case of domestic servants, such hiring may be determined by a month's notice or a month's wages in advance given or paid at any time (*Turner v. Mason*, 14 M. & W. 112); but in the case of clerks and respectable servants, the hiring, if general, is construed to be a hiring for one year, and so on from year to year, and must be determined with the year, at least in the absence of misconduct (*Beeston v. Collyer*, 4 Bing. 309). But a hiring at two guineas a week for one year has been held to be not a yearly but a weekly hiring (*Robertson v. Jenner*, 15 L. T. (N.S.) 514). So on a contract to pay a commercial traveller by commission, no implication arises of a yearly hiring. *Naylor v. Yearsley*, 2 F. & F. 41.

Every person suffering himself to be hired as a skilled artisan warrants that he possesses the requisite ability and sufficiency, and upon proof of his want of such ability or sufficiency; i.e., of his incompetency, his employer may discharge him. *Harmer v. Cornelius*, 5 C. B. (N.S.) 236.

A servant has a right to be paid for his work, and paying for same otherwise than by money is contrary to the Truck Act (1 & 2 Will. 4, c. 37), but that Act properly applies to labourers only. *Riley v. Warden*, 2 Ex. 59.

A servant is not personally liable on contracts made by him for his master; but he is liable for torts committed by him, although at the command of his master (*Cranoh v. White*, 1 Scott, 314) (a case of trover); similarly he is civilly liable for assisting his master in a fraud (*Cullen v. Thomson*, 4 Macq. H. L. C. 441). Conversely, the master is liable for the tort of his servant committed in his service. *McManus v. Crickett*, 1 East, 106.

MASTER AND SERVANT—continued.

A master lies under certain duties to his servant. He is bound to provide an apprentice with medical attendance and medicine during sickness (*Reg. v. Smith*, 8 C. & P. 153); *secus*, in the case of a menial or general servant. He is bound to provide for the reasonable safety of his servant while engaged in his employment, as by fencing machinery and otherwise; but having done that, he is secure,—thus, a master was held not liable for an injury sustained by his servant through the breaking down of a carriage in which the servant was riding at the time on his master's business, through a defect in the carriage of which the master was not aware. *Priestley v. Fowler*, 3 M. & W. 1.

A master may maintain an action for debauching his servant (*Fores v. Wilson*, 11 E. R. 55); and may even justify an assault in protecting his servant (*Tickell v. Head*, Loft. 215). So also trespass will lie by a master for enticing his servant away. *Hart v. Aldridge*, Cowp. 54.

Under various statutes the justices have a summary jurisdiction in questions arising between masters and their servants, as for non-payment of wages by the master, for misconduct on the part of the servant, and such like.

MATRONS, JURY OF. A jury of matrons is a jury formed of women, which is impanelled to try the question whether a woman be with child or not.

See title *DE VENTRE INSPICIENDO*.

MATTER OF RECORD, MATTER IN DEED, AND MATTER IN PAIS. *Matter of record* signifies some judicial matter or proceeding entered upon one of the records of the Court, and of which the Court takes peculiar cognizance. Thus the pleadings in an action in the superior Courts, and in the Courts of record, being matter which is entered upon the records of the Court and filed with its officer as an authentic history of the suit, is thence termed a matter of record.

Matter in deed is some private matter or thing contained in a deed between two or more parties; as the covenants or recitals in a lease, or in a mortgage deed for instance; and these, although inrolled, that is, transcribed upon the records of one of the Queen's Courts at Westminster, or at a Court of Quarter Sessions, as they often are, for safe custody, do not thereby become matter of record, but are simple deeds recorded or inrolled; for there is a material difference between a matter of record and matter recorded for the purpose of being kept in memory; a record being an entry on parchment of judicial matters or proceedings which have taken place in a Court of record, and of

MATTER OF RECORD, MATTER IN DEED, AND MATTER IN PAIS—cont.

which the Court takes judicial notice, as matter coming peculiarly under its own cognizance, whereas the inrolment of a deed is a private act of the parties concerned, of which the Court takes no cognizance at the time when it is done.

Matter in Pais simply means matter of fact, probably so called because matters of fact are triable by the country, i.e., by a jury. The above several phrases are generally used in connection with the subject of estoppel. Thus any allegation of fact, or any admission made in pleading (whether it be express or implied, from pleading over, without a traverse), will preclude the party from afterwards contesting the truth of the matter so alleged or admitted, upon the trial of the issue in which such pleading terminates. This is an estoppel by matter of record. As an instance of an estoppel by deed, may be mentioned the case of a bond reciting a certain fact. The party executing that bond will be precluded from afterwards denying in any action brought upon that instrument the fact so recited. An example of an estoppel by matter *in pais* occurs when one man has accepted rent of another; in such case he will be estopped from afterwards denying in any action with such person that the latter was at the time of such acceptance his tenant.

See title *ESTOPPEL*.

MEDIATORS OF QUESTIONS. By 27 Edw. 3, st. 2, c. 24, six persons, so called, were authorized when any question arose amongst merchants touching any unmarketable wool, or undue packing, to certify upon oath, and settle the same before the mayor and officers of the staple, and by whose award therein the parties concerned were to abide. Cowel.

MEDICAL PRACTITIONER. The stat. 55 Geo. 3, c. 194, makes regulations regarding the education, examination, admission, and practice of APOTHECARIES, and imposes a penalty of £20 for every violation thereof. Practising as an apothecary means mixing up and preparing medicines prescribed either by a physician or by the apothecary himself (*Woodward v. Ball*, 6 C. & P. 577). An apothecary violating the Act has no means of recovering his charges, s. 21. *Steel v. Henley*, 1 C. & P. 574.

The stat. 15 & 16 Vict. c. 56, regulates the qualification of pharmaceutical chemists; and the stat. 14 & 15 Vict. c. 13 (as to arsenic), and 31 & 32 Vict. c. 121 (as to other poisons generally), regulate the sale of medicines of a poisonous character.

The stat. 21 & 22 Vict. c. 90 (the

MEDICAL PRACTITIONER—*continued.*

Medical Act), and 23 & 24 Vict. c. 66, and other Acts, regulate the qualifications and powers of surgeons and physicians, and constitute a council, the members of which are the sole judges of the correctness of professional conduct (*Ex parte La Mert*, 4 B. & S. 582). A physician registered under 21 & 22 Vict. c. 90, who attends a patient professionally, and who is not prohibited by any bye-law of the College of Physicians from suing for same, may recover his fees without an express contract (*Gibbon v. Budd*, 2 H. & C. 92); but before that Act a physician could not maintain an action for his fees. *Chorley v. Baloot*, 4 T. R. 317.

MEDICINE : See preceding title.

MEDIETAS LINGUÆ. A jury *de medietate linguae* is a jury consisting one-half of natives and the other half of foreigners, to try a cause in which either the plaintiff or the defendant is a foreigner (*Staun. Pl. Cor. Lib. 3, c. 7*). But such juries are abolished by the Juries Act, 1870 (33 & 34 Vict. c. 77). Aliens who have been domiciled here for ten years or upwards, and being otherwise qualified, are now competent generally to serve on juries.

See title JURIES.

MEMORIAL OF DEEDS. By several Acts of Parliament all deeds and wills concerning the conveyance or disposition of estates in the counties of York, Kingston-upon-Hull, and Middlesex (subject to certain exceptions), are required to be registered, and such registration is effected by the execution and deposit of a memorial under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, which memorial is to contain,—first, the day of the month and year when the instrument bears date, the names and additions of all the parties to it, and of the witnesses, and the places of their abode; and, secondly, a description of the property conveyed, or proposed to be conveyed or disposed of, the names of the parishes wherein it respectively lies, and the manner in which the same property is dealt with or affected by such instrument or instruments. It is proposed to render the registration of such memorials universal throughout England, by and in accordance with an Act to be intitled the Transfer of Land Act, but which Act has for the present been postponed.

MEMORY OF MAN. In law the memory of man is supposed to extend back to the time of Richard I.; and until the 2 & 3 Will. 4, c. 71, any custom might have been destroyed by proving that it had

MEMORY OF MAN—*continued.*

not existed uninterruptedly from that period. But though it was essential to the validity of a custom that it should have existed before the commencement of the reign of Richard I., yet proof of a regular usage for twenty years, not explained or contradicted, was that upon which many public and private rights were held, and sufficient for a jury in finding the existence of an immemorial custom. See *Mounsey v. Iemay*, 3 H. & C. 486; and title LEGAL MEMORY.

MENSÂ ET THORO : See title DIVORCE.

MERCY. "To be in mercy" was the usual conclusion of a judgment in an action at Common Law. When the judgment was for the plaintiff, the form was that the defendant "be in mercy" (*misericordia*), that is, be amerced or fined for his delay of justice; when for the defendant, that the plaintiff be in mercy for his false claim. The practice of imposing any actual amercement has been long obsolete. *Steph. 122*.

See title AMERCIAMENT.

MERE MOTION (*mero motu*). The free and voluntary act of a party himself, without the suggestion or influence of another person. The phrase is used in letters patent, whereby the king grants, "of his especial grace, certain knowledge, and mere motion" (*ex speciali gratia, certâ scientiâ, et mero motu*), his licence, power, and authority to the patentee to use and enjoy, exclusively, the new invention; and it manifests that the grant is not made upon the suggestion or suit of the party, but of the free and unfettered will of the monarch himself. *Webster on Patents*, 76, n. (d).

The expression is also applied to the occasional interference of the Courts of Law, who, under certain circumstances, will (*ex mero motu*), of their own motion, object to an irregularity in the proceedings of the parties to an action, though no objection be taken to the informality by the plaintiff or defendant in the suit. 3 *Chitty's Gen. Pr.* 430; 3 *Dowl.* 110; 1 *Bing. N. C.* 258; 1 *B. & P.* 366.

MERE RIGHT (*jus merum*). The right of property (the *jus proprietatis*), which a person may have in anything, without having either possession or even the right of possession, is frequently spoken of in our books under the name of the mere right, and the estate of the owner is in such cases said to be totally divested and put to a right. *Co. Litt.* 345.

MERGE. This term is the equivalent of *confusio*, in the Roman Law, and

MERGER—continued.

indicates that where the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; whence also merger is often called Extinguishment. And just as in the Roman Law the prætor in certain cases where merger would be inequitable, intercepted and prevented it,* so also in English Law the Chancellor interferes in like cases to prevent it. And therefore it is a rule of English Law, that merger or extinguishment will or will not take place in Equity according to the intention actual or presumed of the person, in whom the two interests come to be united; and even at Law, merger is excluded in certain cases.

The doctrine of merger is chiefly of importance with reference to real property; and in examining the subject, it is convenient to divide it under two heads, namely:—

(1.) Cases in which the owner of the charge becomes also owner of the estate; and

(2.) Cases in which the owner of the estate becomes also owner of the charge.

Now, firstly, as a general rule, where the owner of the charge becomes also owner of the estate whether in fee simple or in fee tail, the charge is *ipso facto* merged and extinguished in the estate. But to this general rule there are the following exceptions, that is to say,—(1.) The charge may be kept alive, and the intention to keep it alive may be either expressed in so many words, or may be implied from circumstances or from conduct. For example, if a mortgagee who purchases the equity of redemption takes a conveyance thereof to a trustee for himself, and the conveyance contains a declaration that the mortgage security shall remain on foot, there, from the expressed intention of the party, merger is excluded. Again, the intention to prevent a merger, where not expressed, has been implied under the following circumstances, viz.:—

(a.) The mortgagee, becoming beneficial devisee of the equity of redemption and being also executor of the testator-mortgagor, in his residuary account as executor stated that he had retained £467 out of the personal estate towards payment of his mortgage debt, and afterwards devised the property to X., Y., and Z., provided they undertook to receive the same with all the liabilities attaching thereunto; and it was held upon the intention which these acts implied, that the charge had not been merged in the estate (*Hatch v. Skelton*, 20 Beav. 453). Again,

MERGER—continued.

(b.) If the effect of suffering the charge to merge would be to give priority to subsequent incumbrances, it will be presumed, from the clear advantage arising to the owner of the estate from keeping the charge alive, that the charge has not become merged in the estate (*Forbes v. Moffatt*, 18 Ves. 384); and this will be *a fortiori* so, if the owner is a lunatic (*Lord Compton v. Oxenden*, 2 Ves. Jun. 261); and,

(c.) If the owner of the charge becomes entitled only to a limited interest in the estate, the charge will clearly not merge, although this case is hardly an exception to the general rule as stated above.

And, secondly, as a general rule, where the owner, whether in fee simple or in fee tail, becomes also owner of the charge, the charge is *ipso facto* merged or extinguished in the estate. This rule is almost without exception where the charge comes to the owner of the estate by succession or by bequest; and even where it comes to him by being purchased up by him, the general rule almost invariably holds, but with the following exceptions:—

(a.) When the owner of the estate who buys up the charge is not in possession of the estate, but is, say, a tenant in tail or in fee simple in remainder expectant upon some other estate, the owner of which might bar or exclude his interest altogether, in that case the charge will not merge (*Wiggell v. Wiggell*, 2 S. & S. 364), even although he should afterwards become entitled in possession (*Horton v. Smith*, 4 K. & J. 624); also,

(b.) Similarly, where the owner who buys up the charge has only a defeasible estate by reason of some executory devise over, which may or may not take effect, the charge will not merge in the estate, even although the owner should be in possession (*Drinkwater v. Combe*, 2 S. & S. 340); and,

(c.) If the owner who buys up the charge is an infant, the Court of Chancery sanctioning the purchase, there is no merger, as the infant can express no intention in the matter, and the Court will not prejudice him or the real or personal representatives who may claim under him (*Alsop v. Bell*, 24 Beav. 451); also,

(d.) If the owner who becomes entitled also to the charge has an interest in keeping the charge alive, e.g., if the merger or extinguishment of the charge would give priority to subsequent incumbrances, in that case there will be no merger, in whatever manner, whether by succession, bequest, or purchase, the owner has acquired the charge (*Grice v. Shaw*, 10 Hare, 76); and,

* See Brown's Savigny on Obligations, p. 15.

MERGER—continued.

(e.) If the owner who becomes entitled to the charge has only a limited interest in the estate, e.g., if he is only tenant for life, the charge will clearly not merge, at least when he has acquired the charge by purchase (*Burrell v. Earl of Egremont*, 7 Beav. 205); and apparently (on principle at least), not even where he has acquired the charge by succession or bequest; but this case is, in fact, scarcely an exception to the general rule of merger as stated above (see *Morley v. Morley*, 5 De G. M. & G. 620); lastly,

(f.) No merger will take place where a merely contracting purchaser of an estate pays off a charge upon it, before the completion of his purchase (*Watts v. Symes*, 1 De G. M. & G. 240); and apparently not even if the purchase is afterwards completed.

There are also other special causes excluding merger. Thus, tithes will not merge by mere unity of possession (*Chapman v. Gatoombe*, 2 Bing. N. C. 516); as neither will a commutation rent-charge in lieu of tithes; but provision has been made by certain recent statutes for effecting a merger of both whenever the land and the tithes or rent-charge belong to one and the same individual. Moreover, redeemed land-tax is on the same footing as commutation rent-charge with regard to the question of merger. *Ware v. Polhill*, 11 Ves. 257.

Again, where the estate and the charge become vested in the same individual in different rights, e.g., the estate in his own right and the charge *in autre droit*, or *vice versa*, in such a case, the general rule, even at Law, is this, that the union of the two will not cause any merger, if such union be occasioned by the act of law, e.g., by descent or devise, and not by the act of the party, e.g., by purchase. So, if the owner of a term make the freeholder his executor, the term will not merge; but if the executor holding the term as such, should himself purchase the immediate freehold, the better opinion is that the term will merge, subject only to the rights of the creditors (if any) of the testator.

Again, if one of two joint holders of a term obtain the immediate freehold, his moiety of the term will merge; and conversely, if the sole owner of a term obtain the immediate freehold jointly with another, one moiety of the term will merge, and the joint ownership of the freehold will continue, subject only to the remaining moiety of the term. See *Will. Real Prop.*, p. 400.

MERITORIOUS CAUSE OF ACTION.

A person is sometimes said to be the meritorious cause of action when the cause of action, or the consideration on which the

MERITORIOUS CAUSE OF ACTION—continued.

action was founded, originated with, or was occasioned by, such person. Thus, in an action by husband and wife for the breach of an express promise to the wife in consideration of her personal labour and skill in curing a wound, she would be termed the meritorious cause of action. So in an action by husband and wife upon an agreement entered into with her before marriage, she would be the meritorious cause of action; for it originated or accrued out of a contract entered into with her. So a promissory note made to the wife during coverture in her own name is presumed to be made upon a consideration moving from her (*Leake on Contracts*, 240-1). In all such cases the husband and wife ought to be joined as co-plaintiffs, because in case the wife survive after commencement but before conclusion of the action, the right of recovery will survive to her, and the suit will not have abated by the husband's death. But it appears to be optional with the husband, if he chooses to take the risk, to sue alone in all such cases.

MERITS. The real or substantial grounds of the action are frequently so termed, in contradistinction to some technical or collateral matter which has been raised in the course of the suit. Thus where, at a time when special demurrers were in use, a defendant demurred to the plaintiff's declaration on the ground of some informality, and the plaintiff, instead of amending, joined in demurrer, with the view of having the point argued before the Court; in such case, although he might be beaten upon the demurrer, by the Court deciding against the sufficiency of the declaration in point of form, yet as the merits, or substantial grounds of the action, still remained to be tried, he might ultimately be successful upon these. So an affidavit of merits signifies an affidavit that upon the substantial facts of the case justice is with the party so making such affidavit. Such an affidavit is required in support of certain motions to the Court, e.g., in order to let in a defendant to defend after judgment signed. *Listed v. Lee*, 1 Salk. 402; and, generally, *Day's Common Law Practice*, pp. 63-6.

MERTON, STATUTE OF. The 20 Hen. 3, is so called because it was passed in a convent of St. Augustin, situate at Merton, in Surrey. The particular provisions of the statute regarded, 1st. Legitimacy of children (see title LEGITIMATION); 2ndly. Dower; 3rdly. Inclosure of common lands; and, 4thly. Wardships.

See also title STATUTES.

MESNE (*medius*). Middle, intermediate, intervening. The word "mesne" is ordinarily used in the following combinations:—1st. Mesne Lord; 2nd. Mesne Process; 3rd. Mesne Assignments; 4th. Mesne Incumbrances; 5th. Mesne Profits.

1st. A Mesne Lord was applied in the feudal times to the lord of a manor who had tenants under him, and yet a superior lord over him, and so held an intermediate position between the two.

2nd. Mesne Process is generally used in contradistinction to final process, and signifies any writ or process issued between the commencement of the action and the suing out final process or execution in such action; and includes also the writ of summons, notwithstanding this is the process by which personal actions are commenced, and therefore cannot be regarded now as mesne or intermediate process, in the literal sense of the word. See *per Parke, B.*, in *Harmer v. Johnson*, 14 M. & W. 340.

3rd. Mesne Assignment signifies an intermediate assignment. Thus, if A. grant a lease of land to B., and B. assign his interest to C., and C. in his turn assign his interest therein to D., in this case the assignments so made by B. and C. would be termed mesne assignments; that is, they would be assignments intervening between A.'s original grant and the vesting of D.'s interest in the land under the last assignment.

4th. Mesne Incumbrances signify intermediate charges, burdens, liabilities, or incumbrances; that is, incumbrances which have been created or have attached to property between two given periods. Thus, when a vendor of an estate covenants to convey land to a purchaser free from all mesne incumbrances, it commonly means free from all charges, burdens, or liabilities which might by possibility have attached to it between the period of his purchase and the time of the proposed conveyance to the intended vendee.

5th. Mesne Profits are intermediate profits; that is, profits which have been accruing between two given periods. Thus, after a party has recovered the land itself in an action of ejectment, he frequently brings another action for the purpose of recovering the profits which have been accruing or arising out of the land between the periods of his title to the possession accruing or being raised, and of his recovery in the action of ejectment, and such an action is thence termed an action for mesne profits. In ejectment by landlord against tenant, mesne profits are recoverable in the very action itself of ejectment, upon proof of title by the landlord; but in all other cases of ejectment, a special action for mesne profits must be brought as above.

MESNE—continued.

See Bull. & Leake, *Prec. of Plead.* pp. 421-2, n. (a).

MESNE, WRIT OF (*de medio*). A writ in the nature of a writ of right, which lay when, upon subinfeudation, the mesne or middle lord suffered his under-tenant, or tenant paravail, to be distrained upon by the lord paramount for the rent due to him by the mesne lord. 2 Inst. 374.

MESSAGES FROM THE CROWN. The mode of communicating between the Sovereign and the Houses of Parliament. Such messages are brought either by a member of the House, being a minister of the Crown, or by one of the royal household. In the Lords, when there is such a message, the bearer of it having intimated that he has a message under the royal sign manual, the Lord Chancellor proceeds first to read it, and then the clerk at the table reads it over again. In the Commons the member appears at the bar and informs the Speaker that he has a letter from Her Majesty. He then takes it to the table and presents it, upon which the Speaker reads it, the members the meanwhile remaining uncovered. These forms having been gone through, the House proceeds to deal with the message accordingly. *May's Parl. Pr.*

MESSENGERS. The messenger of the Court of Chancery is an officer whose duty it is to attend on the great seal either in person or by deputy, and to be ready to execute all such orders as he shall receive from time to time from the Lord Chancellor, Lord Keeper, or Lords Commissioners (Chan. Com. Rep. 138, cited in *Smith's Ch. Pr.* 57). There are certain persons also who are attached to the Court of Bankruptcy who are styled messengers, and whose duty consists, amongst other things, in seizing and taking possession of the bankrupt's estate during the proceedings in the bankruptcy. See G. R. made in pursuance of the Bankruptcy Act, 1869, as to Messengers' Deposits; *Yate Lee's Bankruptcy*, pp. 898-900.

MESSAGE. This word is now synonymous with the word "dwelling-house," but, as having once had a larger signification, it invariably precedes the word "dwelling-house" in a description of parcels. A grant of a message with the appurtenances will pass not only the dwelling-house but also all buildings adjoining or attached to it, together with the curtilage, garden, and orchard, and the close in which the house is built, and any pleasure grounds adjoining and belonging to it. See 2 Bing. N. C. 618; *Les Termes de la Ley*.

METROPOLIS. Various statutes have

METROPOLIS—continued.

been passed, mostly in the present reign, for the due management of the metropolis, for a summary of the effect of which see the following respective titles, viz. :—

METROPOLITAN BUILDINGS;
METROPOLITAN BURIALS;
METROPOLITAN GAS;
METROPOLITAN MAGISTRATES;
METROPOLITAN POLICE; and
METROPOLITAN SEWERS.

METROPOLITAN. The Archbishop of Canterbury is styled "Primate of all England and the Metropolitan," because the province of Canterbury contains within it the metropolis or chief city. The metropolitans were so called because they presided over the churches of the principal cities of the province. It was their duty to ordain the bishops of their province, to convoke provincial councils, and exercise a general superintendence over the doctrine and discipline of the bishops and clergy within the provinces. The province of York anciently claimed and had a metropolitan jurisdiction over all the bishops of Scotland until about the year 1466, shortly after which time Pope Sixtus the Fourth created the Bishop of St. Andrew's Archbishop and Metropolitan of all Scotland. 1 Burn's Ecc. Law, by Phillimore, 194, 197, tit. "Bishops"; Rog. Ecc. Law, 105, 113.

METROPOLITAN BUILDINGS. The stat. 18 & 19 Vict. c. 122 (the Metropolitan Building Act, 1855), amended by the Act 23 & 24 Vict. c. 52, taken in conjunction with 7 & 8 Vict. c. 84, ss. 54-63, regulates the construction and use of buildings in the metropolis and its neighbourhood. No contract for building in contravention of these Acts can be enforced (*Stevens v. Gourley*, 7 C. B. (N.S.) 99). It is in general necessary, before commencing buildings, to give notice thereof to the district surveyor, but in the case of buildings intended for Her Majesty's use or service, such notice is unnecessary (*Reg. v. Jay*, 8 El. & Bl. 469); and the rules of construction contained in Schedule 1 of the Act of 18 & 19 Vict. c. 122, have no reference to public buildings, all which latter class of buildings are to be constructed in such manner as may be approved by the district surveyor, from whom there is an appeal to the Metropolitan Board of Works (*Reg. v. Carruthers*, 10 Jur. (N.S.) 767). The Building Acts generally provide that no structure shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of building, thus securing a certain regularity of frontage to the street (*Tear v. Freebody*, 4 C. B. (N.S.) 228).

METROPOLITAN BUILDINGS—contd.

Before commencing alterations in adjoining tenements it is necessary to give three months' notice to the owner of the tenements adjoining them. *Coven v. Phillips*, 33 Beav. 18.

METROPOLITAN BURIALS. The stat. 10 & 11 Vict. c. 63, consolidates the provisions usually inserted in Acts for constructing cemeteries; and that and the subsequent Act, 15 & 16 Vict. c. 85, and other amending Acts, express the law regarding the interment of the dead within and beyond the limits of the metropolis. The stat. 20 & 21 Vict. c. 81, provides for the constitution of burial boards in parishes. A Cemetery Act usually provides that certain fees shall be paid by the cemetery company to the incumbent of the parish or other ecclesiastical district or division from which any body shall be removed for interment in the cemetery (*Vaughan v. South Metropolitan Cemetery Company*, 1 J. & H. 256); and the incumbent as a rule enjoys the like right under the ordinary Burial Acts.

METROPOLITAN GAS. The stat. 3 & 4 Will. 4, c. 90, contains general provisions for lighting the parishes in England and Wales with gas; but its provisions are excluded in districts where the Public Health Acts are adopted (see title HEALTH, PUBLIC). The Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15), consolidates the provisions usually contained in Acts authorizing the construction of gasworks. The metropolis is supplied with gas by various companies, under the provisions of the Metropolitan Gas Act, 1860 (23 & 24 Vict. c. 125).

METROPOLITAN MAGISTRATES. The jurisdiction and duties of magistrates of the police courts established within the metropolitan police district are regulated by the stat. 2 & 3 Vict. c. 71, 3 & 4 Vict. c. 84; and 11 & 12 Vict. cc. 42, 43. These magistrates are appointed by the Queen in virtue of the stat. 21 & 22 Vict. c. 73, s. 14, when *stipendiary*; but in addition to such class of magistrates, there are also others entitled to act as magistrates within the metropolitan police district by virtue merely of being nominated on the commission of the peace for the county (see title JUSTICES OF THE PEACE). The 1st section of the stat. 21 & 22 Vict. c. 73, extending the jurisdiction of a stipendiary magistrate, when sitting alone, does not extend to the metropolitan police magistrates.

METROPOLITAN POLICE. The stat. 10 Geo. 4, c. 44, 2 & 3 Vict. c. 47, and

METROPOLITAN POLICE—*continued.*

3 & 4 Vict. c. 84, regulate the police in and near the metropolis; and by the stat. 19 & 20 Vict. c. 2, one commissioner of police for the metropolis is to be henceforth appointed; but the Queen may appoint two assistant commissioners. Under the stat. 24 & 25 Vict. c. 51, s. 3, a penalty not exceeding £5 may be imposed upon any person who assaults a constable of the metropolitan police force in the execution of his duty.

METROPOLITAN SEWERS.

The stat. 11 & 12 Vict. c. 112, consolidated the metropolitan commissions of sewers, which were continued for short intervals by subsequent Acts, until the year 1856, when by the stat. 18 & 19 Vict. c. 120, all duties, powers, and authorities vested in the Metropolitan Commissioners of Sewers ceased to be so vested, and the Metropolitan Board of Works was substituted in the place of these commissioners, and all property, matters, and things vested in the Metropolitan Commissioners of Sewers, except such sewers as were vested in any vestry or district board outside the limits defined in the schedules of the Act, were vested in the Metropolitan Board of Works. The city of London is not affected by these Acts, but is regulated by its own Act, viz., 11 & 12 Vict. c. 163 (City of London Sewers Act).

MEUBLES. These are in French Law the moveables of English Law. Things are *meubles* from either of two causes,—(1.) From their own nature, *e.g.*, tables, chairs; or (2.) From the determination of the law, *e.g.*, obligations.

MEUBLES MEUBLANS. These are in French Law the utensils and articles of ornament usual in a dwelling-house.

MIDDLESEX, BILL OF: See title BILL OF MIDDLESEX.

MILEAGE. A payment or charge of so much per mile is so termed. It is frequently used with reference to the charge made by sheriffs, when, for the purpose of executing writs, they have to travel any given number of miles.

MILITARY COURTS: See titles COURT MARTIAL and COURT OF CHIVALRY.

MILITIA: See title ARMY.

MILLS: See title FACTORIES.

MINES AND MINERALS. *Primâ facie* the owner of the surface is entitled to the surface itself, and all below it, *ex jure nature*; and those who claim the property in the minerals below must do so by some

MINES AND MINERALS—*continued.*

grant or conveyance by him; and in such latter case the rights of the grantee must depend on the terms of the grant; although, *primâ facie*, it will be presumed, if the minerals are to be enjoyed, that a power to get them was also granted as a necessary incident (*Rowbotham v. Wilson*, 8 H. L. C. 348). Where the claim to mines or minerals is rested upon the Statute of Limitations, it is not enough to shew the absence for twenty years of enjoyment of the mines or minerals on the part of the plaintiff, but it is necessary further to shew the presence of enjoyment on the part of the defendant. *Rowe v. Grenfel*, Russ. & My. 396.

As to what are mines and minerals, it has been said (*Cleveland v. Meyrick*, 37 L. J. (Ch.) 124) that the definition depends on the mode of working and not upon the material obtained from the mine; and so in that case slates obtained by mining as opposed to quarrying were held to be mines. But this definition is exceptional, and, perhaps, it is even exceptionable; for in *Micklethwaite v. Winter* (6 Ex. 644), stones got by quarrying were held to be minerals. Therefore, generally (unless we are to distinguish between mines and minerals), the materials, and not the mode of working, must be made the criterion; or, speaking perhaps more accurately, mines are materials obtained by mining, and minerals are the like materials obtained either by mining or by quarrying, such materials being so very numerous and various as to admit of description or enumeration only, and not of definition. In strictness, *mines* are the openings only, and not the material extracted from the earth through these openings.

Where the surface of land belongs to one owner, and the mines and minerals belong to another owner,—Then

(a.) If nothing appears shewing their respective titles, or the measure of the respective grants of the respective hereditaments to the two respective owners, the mine-owner cannot so mine the vertical strata as to destroy the surface above, or even so as to occasion a subsidence thereof, while that surface remains in its natural state (*Humphries v. Brogden*, 15 Q. B. 739); and after buildings have stood on the surface for twenty years, the right of natural support to the land and buildings thereon from the vertical strata and also from the adjacent strata is acquired (*Browne v. Robins*, 4 H. & N. 186); and

(b.) If the mode of the acquisition of the respective titles, or even the respective deeds of grant of the respective several tenements, are existing, then the words of the deeds are to be regarded;

MINES AND MINERALS—continued.

and in consequence of such words the right of natural support, as well from the vertical as from the adjacent strata, may be found to have been either abandoned or diminished; but the Court fights against that conclusion. Compare *Harris v. Ryding*, 5 M. & W. 60; *Williams v. Bagnall*, 15 W. R. 273; and *Smith v. Darby*, L. R. 7 Q. B. 720.

MINISTERIAL POWERS. These powers, as the name indicates, are given for the good, not of the donee himself exclusively, or of the donee himself necessarily at all, but for the good of several persons, including or not including the donee also. They are so called because the donee of them is as a minister or servant in his exercise of them. They are of various kinds.

(1.) The ministerial powers of a tenant for life are the following, viz.:—

(A.) A power of leasing. This power depends upon and is regulated by the Act 19 & 20 Vict. c. 120, and the Act 21 & 22 Vict. c. 77, called respectively the Leases and Sales of Settled Estates Act and the Act amending the same. Under these Acts it is lawful for a tenant for life who is so under a settlement dated after the 1st of November, 1856, which does not expressly exclude the Act, to demise for any term not exceeding twenty-one years any part of the settled estates (except the principal mansion-house or the demesnes thereof), provided he observes the following requisites, namely:—

- (a.) Lease only in possession;
- (b.) Make the demise by deed;
- (c.) Reserve the best obtainable rent;
- (d.) Take no premium or fore-gift;
- (e.) Make the lessee impeachable for waste;
- (f.) Insert a covenant for payment of rent, and other usual and proper covenants;
- (g.) Insert a condition of re-entry for non-payment of rent for twenty-eight days, or for non-observance of the other covenants; and
- (h.) Obtain the lessee to execute a counterpart of the lease.

The tenant for life may exercise the power of leasing to the extent aforesaid without any application to the Court of Chancery.

And in case the settlement is of a date prior to the 1st of November, 1856, or in case a longer term of demise than twenty-one years is desired to be granted, then upon application to the Court of Chancery for its sanction thereto, the tenant for life may (under certain conditions, for which see the Acts) grant the following varieties of lease, namely:—

- (a.) An agricultural lease for twenty-one years or under;

MINISTERIAL POWERS—continued.

- (b.) An occupation lease for twenty-one years or under;
- (c.) A mining lease for forty years or under;
- (d.) A water lease or other easement lease for forty years or under;
- (e.) A repairing lease for sixty years or under;
- (f.) A building lease for ninety-nine years or under.

And where it is possible to satisfy the Court that it is customary in the district and beneficial to the inheritance to grant longer leases than for the periods above mentioned, the Court will sanction the tenant for life granting leases for longer periods than those above mentioned in all the above mentioned varieties of lease, excepting only the agricultural lease or first variety.

(B.) A power of borrowing money for the improvement of the estate, and charging the loan upon the inheritance. This power was necessitated by the somewhat rigorous rule of Courts of Equity which denied any remuneration to tenants for life for the expenses they might have incurred, even for permanent improvements, unless the improvements were absolutely indispensable for the maintenance of the estate at its accustomed value (see *Dent v. Dent*, 30 Beav. 363); and now no prudent tenant for life should expend his own money on the estate, it being free to him to expend borrowed money for the purpose. His power of borrowing depends upon various Acts, that is to say—

- (a.) If, on the one hand, the money intended to be borrowed is to be expended in *agricultural* improvements, then he may have it from Government under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), upon the terms of that Act; and
- (b.) If, on the other hand, the money intended to be borrowed is to be expended in the improvement of a *residence*, then he may have it from Government in like manner, although to a more limited extent, under the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56), and the Act amending same (34 & 35 Vict. c. 84) upon the terms of those two Acts; and

(C.) A power of selling the settled estates and conveying the same to the purchaser for an estate in fee simple. This power depends upon various Acts, principally upon the Act 11 Geo. 4 & 1 Will. 4, c. 47, which authorizes a sale or mortgage of the lands, when that is requisite for the payment of the debts of the testator, being the

MINISTERIAL POWERS—*continued.*

settlor; the provisions, however, of which Act have been largely superseded by the provisions of the Trustee Act, 1850 (13 & 14 Vict. c. 60). and of the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120).

(2.) The ministerial powers of a tenant for life in right of his wife, and of a tenant by the curtesy or in dower, depend as to leasing on the Leases and Sales of Settled Estates Act, 1856, and are generally subject to the same or the like provisions as are above stated regarding a tenant for life in his own right; and

(3.) The ministerial powers of a tenant in tail depend partly on the stat. 3 & 4 Will. 4, c. 74 (as to leasing), and partly on the Leases and Sales of Settled Estates Act, 1856; but owing to the facility with which he may at the present day bar the entail and become absolute owner, the question of his ministerial powers is comparatively insignificant.

See also title **CONVEYANCES**.

MINORS. A person who has not attained his majority is usually so termed, in the Irish Reports principally; that is, an infant under the age of twenty-one years.

See title **INFANCY**.

MISDEMEANOR. A misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition, however, comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the milder term of misdemeanors only. In the English Law the word "misdemeanor" is generally used in contradistinction to felony, and misdemeanors comprehend all indictable offences which do not amount to felony—as libels, conspiracies, attempts and solicitations to commit felonies, &c. 4 Chitty's Bl. 5, and n. 3.

MISERICORDIA. This word was commonly used in our law to signify a discretionary mulct or amercement imposed upon a person for an offence; thus, when the plaintiff or defendant in an action was amerced the entry was always *ideo in misericordia*, and it was so called because the fine was but small (and therefore merciful) in proportion to the offence; and if a man was outrageously amerced in a Court not of record—as in a Court Baron, for instance—there was a writ called *Moderatâ Misericordiâ*, to be directed to the lord or

MISERICORDIA—*continued.*

his bailiff, commanding them that they take moderate amercements in just proportion to the offence of the party to be amerced. When a fine was amerced on a whole county instead of an individual, it was then termed *Misericordia Communis*. F. N. B. 75; *Les Termes de la Ley*.

MISFEASANCE. Doing evil, trespassing, &c.; and he who does so is sometimes called a misfeasor (Cowel). The term is used in contradistinction to a *non-feasance*, which means simply an abstinence from doing altogether. An interesting application of this distinction is to be found in the *Six Carpenters' Case* (1 Sm. L. C. 132), where the mere refusal to pay for the wine (*sc.* beer) which the men had drunk in a public-house was declared not sufficient to make them trespassers *ab initio* in coming upon the premises at all, as breaking the pots or doing other wilful damages and *misfeasances*, it was stated, would have made them.

MISJOINDER. The joining of two or more persons together as the plaintiffs or defendants in an action who ought not to be joined. Nonjoinder is the omitting to join one or more persons who ought to have been joined as the plaintiffs or defendants in an action. See also title **NON-JOINDER**; and generally as to modes of remedying or taking advantage of *misjoinder* or *non-joinder*, see title **AMENDMENT**.

MISNOMER. The mistake in a name or the using one name for another. It is a general rule of law that a misnomer has no effect if the subject matter or person is certain or ascertainable notwithstanding the misnomer, "*Falsa demonstratio non nocet, si de corpore constat*," and in its application to legacies, "*Falsâ demonstratione legatum non perimit*," Just. Inst. ii. 20, 30; and "*Longè magis falsa causa non nocet*," Just. Inst. ii. 20, 30.

MISPLEADING. Pleading incorrectly, or omitting anything in pleading, which is essential to the support or defence of an action, as in the case of a plaintiff not merely stating his title in a defective manner, but setting forth a title which is essentially defective in itself; or, if to an action of debt the defendant pleaded not guilty instead of *nil debet*, this was mispleading (Salk. 865). Also, in Chancery suits, it is a mispleading in certain cases if the defendant do not allege the absence of notice, see title **NOTICE**.

MISPRISION (from the French *mépris*, neglect or contempt). Misprision is gene-

MISPRISION—*continued.*

rally understood to be all such high offences as are under the degree of capital but closely bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever. Misprisions are generally divided into two sorts, negative and positive, the former consisting in the concealment of something which ought to be revealed, the latter in the commission of something which ought not to be done. Of the first, or negative kind, is what is called misprision of treason, which consists in the bare knowledge and concealment of treason, without any degree of assent thereto. Of this negative kind is also misprision of felony, which is the concealment of a felony which a man knows but never assented to. The concealment of treasure trove, which belongs to the king or his grantees by royal prerogative, is also a species of negative misprision. Positive misprisions are generally denominated contempts or high misdemeanors; such, for example, are the mal-administration of such high officers as are in public trust and employment; the embezzling of the public money; contempts against the king's prerogative, his person, and government, or his title, &c. 1 Hawk. P. C. 60.

MITTER LE DROIT (*to pass or transfer the right*). This phrase is used in contradistinction to that of *mitter l'estate*, and both are employed to point out the mode in which releases of land operate. A release might be a conveyance of a right to a person in possession. Thus, where a person was disseised or put out of possession of lands, although the disseisor thereby acquired the possession, still the right of possession and property remained in the disseisee; but if the disseisee agreed to transfer his right to the disseisor, the proper mode of carrying such an agreement into execution was by a release, the disseisor already having the possession; and as in such cases nothing but the bare right passed, the release was said to enure by way of *mitter le droit*, i.e., transferring the right. A release was said to enure by way of *mitter l'estate*, i.e., of passing the estate, e.g., when two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint tenants or co-parceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate*, i.e., transferring the estate. 4 Cru. Dig. 84, 85.

And see title CONVEYANCES, sub-title Release.

MITTER L'ESTATE: See title MITTER LE DROIT.

MITTINUS. A writ by which records

MITTINUS—*continued.*

are transferred from one Court to another, sometimes immediately, as out of the King's Bench into the Exchequer; and sometimes by a *certiorari* into Chancery, and from thence by a *mittinus* into another Court. This word is also used to signify a precept that is directed by a justice of the peace to a gaoler for the receiving and safe keeping of a felon or other offender committed by the said justice to the gaol. *Les Termes de la Ley*.

MIXED ACTIONS are such as partake of the twofold nature of real and personal actions, having for their object the demand and restitution of real property, and also personal damages for a wrong sustained.

MODUS DECIMANDI (*the manner of tithing, or paying tithes*). A discharge from the payment of tithes, by custom or prescription, is said to be either *de modo decimandi* (i.e., in the manner of tithing or paying tithes), or *de non decimando* (i.e., in paying no tithes). A *modus decimandi*, commonly called by the simple name of *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general manner of taking tithes in kind; and this is sometimes effected by a pecuniary compensation, as twopence an acre for the tithe of land; sometimes it is a compensation partly in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him, and the like; in short, any means whereby the general law of tithing is altered, and a new method of taking tithes is introduced, is called a *modus decimandi*, or special manner of tithing. A discharge from the payment of tithes by a custom or prescription, *de non decimando*, arises either from some personal privileges which the party enjoys who is so discharged, or by a real composition made in lieu of payment of tithes, or from some other like circumstance. Thus, the king, by his prerogative, is discharged from all tithes; so a vicar is discharged from paying tithes to the rector, and the rector to the vicar. A real composition is made by an agreement between the owner of lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes in consideration of some laud or other **REAL** recompense being given to the parson in lieu of satisfaction thereof. 2 Inst. 490; 14 M. & W. 393.

See also title TITHES.

MOIETY (from the French, *moitié*, half). The half or part of anything. Thus,

MOIETY—*continued.*

joint tenants are sometimes said to hold by moieties (Cowel). The shares of two joint tenants are of necessity moieties; but the shares of two tenants in common entitled equally, would also be moieties. An inaccurate use of the word "moiety" is that in which it signifies merely *part, share, or proportion*, whether equal or unequal.

MOLLITER MANUS IMPOSUIT (*he laid hands on him gently*). When a person is sued for an assault, he may set forth the whole case, and plead that he laid hands on him gently, *molliter manus imposuit*. From these words having been so used in pleas, several justifications in actions of trespass for assault are called by this phrase (1 Sid. 301). The degree of gentleness [or of roughness] necessarily varies with the degree of the resistance.

MONEY-BILLS. Originally, the Lords and Commons in Parliament voted separate supplies, the last of such votes of which there is any trace having been in 18 Edw. 3. For a brief period subsequently to that date, the Lords and Commons appear to have voted joint supplies; but from the reign of Richard II. probably, and from that of Henry IV. certainly, the practice was for the Commons singly to vote the supplies, and for the Lords merely to assent thereto. See Rolls 9 Hen. 4, where mention is made of the Commons having remonstrated to the King on account of the Lords interfering in the matter of the grant of supplies, and the King is represented to have thereupon conceded that the Commons should for the future determine all such grants without interference from the Lords. This practice appears to have been all the more reasonable in those early reigns, because the supplies fell principally upon the Commons, and in the case of the tenths and fifteenths of goods fell exclusively upon them, unless in the exceptional instance in which the Lords were expressly subjected to the tax.

Originally, money-bills were not in general entered in the statute book, being only so entered when (as was, however, the frequent practice) some relief of grievances was so interwoven with them as to render their entry unavoidable. This was the case, for example, with the money-bill 14 Edw. 3, stat. 1, c. 21. It is not till the reign of Henry VII. that money-bills, being purely such, appear in the statute book, and even then they appear occasionally only; however, by the reign of Henry VIII. they are entered regularly.

In their first mode of entry in the statute-book, money-bills are expressed to be enacted by the authority of Parliament;

MONEY-BILLS—*continued.*

but by the reign of Charles I. the Commons began the practice of omitting the names of the Lords in the preamble and of retaining it only in the enacting part; and this is the present practice (see, *e.g.*, 36 & 37 Vict. c. 3).

About 1661, the Commons began for the first time to object to the Lords making any alterations in money-bills, the immediate occasion of their objection being certain alterations made by the Lords in a bill of that year, introduced by the Commons for providing for the paving of the streets of Westminster. Again, in 1671, the Commons having introduced a bill imposing a tax on sugar, and the Lords having proposed some modifications in it, the Commons remonstrated, and a conference ensued between the two Houses, and in this conference the Commons laid claim to an exclusive privilege in the matter of money-bills. The conference ended in nothing definitive, but the exclusive right which was then claimed has since been acquiesced in, although it has never been expressly acknowledged by the Lords. A like exclusive privilege, which was claimed shortly after 1688, in the matter of bills imposing pecuniary penalties, was similarly acquiesced in, not acknowledged.

MONEY COUNTS. These are simple forms of pleading in actions of *assumpsit*, and were provided by the C. L. P. Act, 1852, Sch. B. They are goods sold, work done and materials provided, money lent, money paid, money received, and such like other counts, which are also sometimes called the common *indebitatus* count.

See titles *ASSUMPSIT*; and *INDEBITATUS ASSUMPSIT*.

MONITION. An order, or admonitory epistle, issuing from a spiritual Court, and addressed to some person or persons offending against the laws ecclesiastical, advising or monishing them to act in obedience to those laws. When a party has been duly served with a monition, he is technically said to have been "monished." See *Rog. Ecc. Law*; *Burn's Ecc. Law*, tit. "Monition."

MONK. The profession of a religious person of this character made him dead in law, or civilly dead (see titles *CIVIL DEATH*, *CLERGYMAN*); but since the Reformation, the monkish profession is not recognised by law in England; and amounting, therefore, to no religious profession at all, it no longer renders the monk civilly dead. *In re Melcalfe*, 33 L. J. (Ch.) 308.

MONOPOLY is the sole right of selling a particular article of manufacture. The power to grant such a right was in early

MONOPOLY—*continued.*

times claimed as a prerogative of the Crown. Its exercise was in many cases most beneficial, as ingenious foreign workmen were from time to time drawn to England by the expectation of substantial commercial advantages being secured to them by royal letters patent (being, in fact, these grants of monopoly); and enterprising Englishmen were also induced by the like expectation to travel abroad and acquire a practical knowledge of trades and arts. But the Crown experiencing in those days the evils of no regular taxation—the chief of which was a perpetually-recurring want of money to conduct the affairs of Government—the prerogative was exposed to, and its exercise soon became affected with, many abuses, principally in this respect,—that the monopoly was sold at a ruinous price, usually to the highest bidder, whether or not he was the true and first inventor of the process of manufacture, and latterly without any regard at all to his capacity or ability as an inventor or manufacturer, and frequently indeed to courtiers, who made it a means of gain exclusively, and did not assist the national industry at all. The evils arising from this abuse of the prerogative were become so great by the latter end of the reign of Elizabeth, that the Courts of Common Law, in the *Case of Monopolies* (*Darcy v. Allen*, 11 Rep. 84), 44 Eliz., adjudged monopolies to be illegal; and parliament took up the matter as early as 1601, and, in the next reign, succeeded in regulating the abuse by enacting the Patent Act (21 Jac. 1, c. 3), which is the basis of the Patent Law at the present day.

See title **PATENTS**.

MONSTER. One who has not the shape of a human being, and, although born in lawful wedlock, cannot be heir to any land. But mere deformity of person does not make any one a monster.

MONSTRANS DE DROIT (*showing of right*). One of the Common Law methods of obtaining possession or restitution from the Crown, of either real or personal property, is by *monstrans de droit*, manifestation or plea of right, which may now be preferred or prosecuted either in the Chancery or in any of the Common Law Courts, although originally in the Chancery and Exchequer only (see *Petitions of Right Act*, 1860, 23 & 24 Vict. c. 84). A *monstrans de droit* lies when the right of the party, as well as the right of the Crown, appears upon record, which is putting in a claim of right, grounded on facts already acknowledged and established, and praying the judgment of the Court whether, upon those facts, the king or the subject has the right. *Skin. 609; Day's Common Law Pro. 562.*

MONTH, in law, is a lunar month, or twenty-eight days, unless otherwise expressed. Hence a lease for twelve months is for forty-eight weeks only; but if it be for "a twelvemonth," it is good for the whole year. In a contract, if the parties obviously intended that a month should be a calendar month, the law will give effect to that intention. If money be lent for nine months, it must be understood calendar months (*Str. 446*); similarly in the case of bills of exchange and promissory notes. In legal proceedings, as in time to plead, a month is four weeks (3 Burr. 1455), but is to denote in future a calendar month, see *Order LI., r. 1, Proposed Rules under Judicature Act, 1873*. But where a statute speaks of a year, it shall be computed by the whole twelve months (2 Cro. 167); and so generally in all statutes.

MORT CIVILE, in French Law denoted civil death, as upon conviction for felony. It was nominally abolished by a law of the 31st of May, 1854, but something very similar to it, in effect at least, still remains. Thus, the property of the condemned possessed by him at the date of his conviction goes and belongs to his successors (*héritiers*), as in case of an intestacy; and his future acquired property goes to the State by right of its prerogative (*par droit de déshérence*), but the State may, as a matter of grace, make it over in whole or in part to the widow and children.

MORT D'ANCESTOR. An assize of *mort d'ancestor* was a writ which lay for a person whose ancestor died seised of lands, &c., that he had in fee simple, and after his death a stranger abated; and this writ directed the sheriff to summon a jury or assize, who should view the land in question, and recognise whether such ancestor were seised thereof on the day of his death, and whether the demandant were the next heir.

MORTGAGE (*mortgagium*, from *mort*, death, and *gage*, pledge). A mortgage may be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed. The debtor who so makes a conveyance of his lands, or so puts them in pledge, is termed the mortgagor, and the creditor to whom the lands are so conveyed as a security for the money lent, is termed the mortgagee. The mortgagee with respect to the tenure which he acquires in the lands so conveyed to him, is also termed a tenant in mortgage.

Mortgages of freehold lands are of two sorts: either the lands are conveyed to the mortgagee and his heirs in fee simple,

MORTGAGE—continued.

with a proviso that if the mortgagor pays the money borrowed on a certain day, the mortgagee will reconvey the lands; or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns for a long term of years, with a proviso that if the money borrowed is repaid on a certain day, the term shall cease and become void. There is also another kind of mortgage, where the proviso for redemption does not oblige the mortgagor to pay the money on a particular day, but allows him to do it at any indefinite time; and this is called a Welsh mortgage. 2 Cruise, 81; 2 Bl. 152.

Mortgages of leasehold lands are likewise of two sorts, being either (1) by assignment, in which case the mortgagee coming into legal privity with the lessor becomes liable to the latter on the rents and covenants; or (2) by underlease, in which case the mortgagee by reason simply of the absence of that privity with the lessor does not become liable to the latter on the rents and covenants. In either case, there is the usual proviso for the re-assignment or surrender of the premises upon repayment of the principal money lent and interest and costs.

Mortgages of copyhold lands, where they constitute the principal or entire security, are usually made by surrender without admittance, subject to a proviso making void the surrender upon repayment of the principal, interest, and costs; but where they are only a subordinate part of the security, the mortgagee is frequently satisfied with a covenant to surrender which he takes from the mortgagor, subject to the usual proviso that the covenant shall be discharged and become void upon repayment of the mortgage debt and interest and costs.

A mortgagee may realise the mortgage debt in various ways,—(1.) By Foreclosure, which he effectuates by means of a suit in Equity; (2.) By Sale, which he carries out either by exercising his power of sale (if any) contained in the mortgage deed, in which case he must carefully conform to the terms of the power, or by exercising the statutory power of sale, which is to be taken (in the absence of an express one) to be implied in every mortgage deed (23 & 24 Vict. c. 145), in which case he must carefully comply with the words of the enabling statute. The mortgagor's remedy against his mortgagee is,—By Redemption, which in the ordinary case he exercises by simply paying back the borrowed money, and in all cases of peculiarity or of unsettled accounts by means of a suit in Equity. Where an estate is mortgaged for successive debts to successive mortgagees, if any mesne mortgagee wishes to realise

MORTGAGE—continued.

his mortgage debt he files a bill in Equity offering to redeem the prior mortgages, and praying to foreclose those that are posterior to himself, according to the rule of practice,—"Redeem up, foreclose down."

See also titles NOTICE; TACKING, &c.'

MORTMAIN ACTS. These Acts had for their object the prevention of lands getting into the possession or control of religious corporations, or, as the name indicates, *in mortuâ manu*. After numerous prior Acts dating from the reign of Edward I., it was enacted by the stat. 9 Geo. 2, c. 36 (called the Mortmain Act *par excellence*), that no lands should be given to charities unless the following seven requisites should be observed, viz:—

- (1.) A deed should be used;
- (2.) The deed should be attested by two or more witnesses;
- (3.) The deed should be indented;
- (4.) The deed should be delivered at least twelve calendar months before the death of the grantor;
- (5.) The deed should be enrolled in the Court of Chancery within six months from its execution;
- (6.) The grant should take effect in possession immediately from the execution of the deed; and
- (7.) The grant should be irrevocable and without any equivalent whatsoever in favour of the grantor.

These seven requisites have, in more recent years, been some of them removed altogether, and others of them relaxed. Thus,—

(1.) A deed, although that is in general still required, yet it is optional with the donor in mortmain, either to use a *deed* or a *will* in the following cases:—

- (a.) In the case of a gift of land for a public park, not exceeding twenty acres for any one such park;
- (b.) In the case of a gift of land for an elementary school, not exceeding one acre for any one such school;
- (c.) In the case of a gift of land for a public museum, not exceeding two acres for any one such museum.

See 34 Vict. c. 13, the Public Parks, Schools, and Museums Act, 1871.

(2.) The attestation of the deed by two or more witnesses, although that is in general still required, yet the attestation of one witness suffices in the following cases:—

- (a.) In the case of a gift of land as a site for a poor school, or for a church, chapel, or meeting-house, or for the residence of the minister, master, or mistress thereof

MORTMAIN ACTS—continued.

(4 & 5 Vict. c. 38, s. 10, and 36 & 37 Vict. c. 49); the gift in any one case not exceeding one acre of land; and

- (b.) Judging at least from the statutory form of the conveyance, see s. 13 of the Act.) In the case of the gift of land not exceeding one acre in any one case in favour of any of the following objects:—

Institutions for the promotion of science, or of literature, or of the fine arts;

Institutions for the instruction of adults, or the diffusion of useful knowledge;

Foundation and maintenance of libraries and reading-rooms;

Public museums;

Picture-galleries;

Natural history collections;

Mechanical and philosophical inventions, instruments, and designs.

See the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112).

- (3.) The necessity to *indent* the deed of gift was altogether abolished by the Act 24 Vict. c. 9.

(4.) The necessity that the deed should be delivered twelve calendar months before the death of the donor remains as a general rule, but has been abolished in the following cases:—

- (a.) In the case of a gift of land as a site for a poor school, church, chapel, or meeting-house, or for the residence of the minister, master, or mistress thereof (7 & 8 Vict. c. 37, s. 3, and 36 & 37 Vict. c. 49); the gift in any one case not exceeding one acre of land;

- (b.) In the case of the gift of land not exceeding one acre in any one case in favour of any of the following objects:—

Institutions for the promotion of science, or of literature, or of the fine arts;

Institutions for the instruction of adults, or the diffusion of useful knowledge;

Foundation and maintenance of libraries and reading-rooms;

Public museums;

Picture-galleries;

Natural history collections;

Mechanical and philosophical inventions, instruments and designs.

See the Literary and Scientific Institutions Act, 1854, *supra*; and

- (c.) In the case of a gift of land for the recreation of adults, or for the playground of children,

MORTMAIN ACTS—continued.

See the Recreation Grounds Act, 1859 (22 Vict. c. 27).

On the other hand, where under the Public Parks, Schools, and Museums Act, 1871 (34 Vict. c. 13), the gift of lands is made either by *deed* or by *will*, the necessity for execution of the deed twelve calendar months before the death of the grantor is retained, and the like necessity is enacted in the case of such gift being made by *will* (s. 5).

(5.) The requisite of enrolment in the Court of Chancery within six months from the execution of the deed is in general preserved, but it has been removed in the following case, viz.,—

In the case of a gift of lands for the recreation of adults, or for the playgrounds of children.

See the Recreation Grounds Act, 1859, *supra*.

On the other hand, where under the Public Parks, Schools, and Museums Act, 1871 (*supra*), the gift of lands is made either by deed or will, the enrolment thereof must be made within six calendar months after the time the same comes into operation, such enrolment being, however, made in the books of the Charity Commissioners. See title CHARITY COMMISSIONERS.

(6.) The requisite, that the grant should take effect in possession *immediately* from the execution of the deed, has been slightly relaxed by the stat. 26 & 27 Vict. c. 106, which has enacted that if such gift take effect within one year from the date of the instrument it shall be deemed to take effect in possession immediately; and

(7.) The irrevocability of the gift remains as a general rule, but under the recent statutes mentioned above, it is a general rule that where any of the lands given for the popular uses specified above, cease to be employed for such uses, they shall revert to the donor, or his representatives, at the time they so cease to be used; also, the requisite excluding reservations in favour of the donor remains as a general rule, but has been exploded in the following cases:—

- (a.) In all cases of the reservation of a peppercorn or nominal rent only (24 Vict. c. 9);

- (b.) In all cases of the reservation of any mines or minerals or any easement (24 Vict. c. 9);

- (c.) In all cases of any covenants or conditions as to erections or repairs, &c. (24 Vict. c. 9);

- (d.) In all cases of the apparent gift being in fact a purchase, and the consideration money therefore is reserved, partly or wholly, in the form of a rent-charge in lieu of a

MORTMAIN ACTS—*continued.*

gross sum (24 Vict. c. 9, and 27 Vict. c. 13); and

- (e.) In all cases of the gift of land, either for the recreation of adults, or for the playgrounds of children.

See the Recreation Grounds Act, 1859, *supra*.

And, in general, there is a provision in all the statutes of Victoria respecting gifts for poor schools, churches, and such like, that the land shall revert to the grantor if it cease to be used for the purpose for which the same was originally granted.

MORTUARY. A mortuary is that beast or other moveable chattel which, upon the death of the owner thereof, by the custom of some places, becomes due to the parson, vicar, or rector of the parish in which the person so dying resided, in lieu or satisfaction of tithes or other ecclesiastical offerings which such party may have forgotten or have neglected to pay while alive. 21 H. 8, c. 6; *Les Termes de la Ley*.

MOTION. An application to the Court by the plaintiff or defendant in an action, or by the counsel for either, in order to obtain some rule or order of Court which may become necessary in the course of the proceedings; and the act of making such an application is termed moving the Court. The word also signifies instance, desire, will, &c. Thus a person is said to do a thing of his own motion, i.e., voluntarily, without being required to do it.

See also the next following titles.

MOTION OF COURSE. Is a motion which is granted as a matter of course, and which, therefore, is not usually made in open Court, but is granted by the master or officer of the Court when the paper containing the direction to move is laid before him, with a barrister's signature attached. Almost everything that may be done on motion of course can also be done, and is ordinarily done, by petition of course at the Rolls. See that title; and 2 Dan. Ch. Pr. Appendix.

MOTIONS IN PARLIAMENT. Making a motion in either House of Parliament is simply the act of submitting a proposition. In the House of Commons a member desirous of making a motion is desired to give previous notice thereof, and having done so, it is entered in terms upon the notice paper or order book. In the Lords this notice is not required by the rules of the House, but, for the sake of general convenience, the same practice ordinarily prevails. In the House of Commons there are certain fixed days appointed for motions

MOTIONS IN PARLIAMENT—*contd.*

of which notice has previously been given, as contradistinguished from "orders of the day," which latter are questions which the House has already agreed to consider, or has partly considered and adjourned for further consideration or debate. On an "order" day the orders have precedence of motions, and on a "motion" day the motions have precedence of orders; but in either case if the one can be disposed of in time, the House will proceed to the other.

MOVEABLES. Moveable and immoveable is one of the commonest, because the most apparent and natural, of the modern divisions of things, as the subjects of property. It is not coincident, however, with the historical divisions which have obtained most extensively in ancient or in modern times, not agreeing with the Roman Law division into *Res Mancipi* and *Res Nec Mancipi* (agricultural and non-agricultural) on the one hand, nor with the English Law division into lands and chattels, or real and personal property, on the other. For example, a leasehold house is an immoveable, and yet is personal property; and a dignity or title of honour is a moveable and yet is real property. Nevertheless, just as the division into *Res Mancipi* and *Res Nec Mancipi* gradually gave way before the industrial development of Roman greatness, so also the division into real and personal property is more and more giving way before the advancing diversities of English wealth. For example, a leasehold house is now for many purposes looked upon as land, and is even declared to be such in the interpretation clause of most modern statutes. But the division into moveable and immoveable, finding its basis in nature, promises to be permanent; and it may grow to be as fertile in consequences as the older divisions have been.

MUNICIPAL CORPORATION: See title CORPORATION.

MUNIMENTS. Deeds, evidences, and writings in general, whether belonging to public bodies or private individuals, are called muniments; and in cathedral and collegiate churches, and generally in all offices, there is a strong room or compartment provided for the keeping of the muniments relating to their property, &c., which is thence termed a muniment house or strong room. *Les Termes de la Ley*; 3 Inst. 170.

MURDER. The act of a person of sound memory, and of discretion, unlawfully killing any person under the king's

MURDER—*continued.*

peace, with malice aforethought, either express or implied. Express malice is signified by one person killing another with a deliberate mind and formed design; and which formed design is evidenced by external circumstances discovering that inward intention; as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. Implied malice is signified by one person's voluntarily killing another without any provocation; for when such deliberate acts are committed, the law implies or presumes malice to have urged the party to the commission of them, although no particular enmity can be proved (3 Inst. 4; 1 Hale, 455). And in case a person trespassing in pursuit of game fires at a bird, and, without any intention at all of doing so, hits and kills a man, that is murder, inasmuch as the act of poaching is felonious, and the felony therein couples itself to the death, and supplies the intention which was lacking. *R. v. Cripe*, 1 B. & Ald. 282.

See also title **MALICE**.

MUTE. A prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or upon having pleaded not guilty, refuses to put himself upon the country.

MUTINY ACT. An Act of Parliament to punish mutiny and desertion, and for the better regulation of the army, and their quarters. The Mutiny Act, properly so called, relates to the army only; the Marine Mutiny Act relates to the navy. Each Act is passed annually, the jealousy of the constitution for the individual's liberties being such as not to tolerate that such Acts, or the jurisdictions which they establish, should become perpetual or permanent. This necessity for their annual re-enactment secures the annual re-assembling of Parliament.

MUTUAL CREDIT: See title **SET-OFF**.

MUTUAL PROMISES. In a declaration in special assumpsit the plaintiff usually alleges that, in consideration that he, at the request of the defendant, had then promised the defendant to observe, perform, and fulfil all things in the agreement on his, the plaintiff's, part, the defendant promised the plaintiff that he would perform and fulfil all things in the said agreement on his, the defendant's, part to be observed and performed, which is thence termed the allegation or statement of mutual promises.

N.

NANTISSEMENT. In French law is the contract of pledge; if of a moveable, it is called *gage*, and if of an immoveable it is called *antichrèse*.

NATIVO HABENDO. A writ which lay for a lord when his villein had run away from him; it was directed to the sheriff, and commanded him to apprehend the villein, and to restore him together with his goods to the lord. But if a villein had tarried in a town or ancient demesne lands for the period of a year and a day without having been claimed by his lord, then the lord could not seize him in either of such places (*Les Termes de la Ley*). It was a writ of right raising the title of the lord, upon whom therefore the *onus probandi* was laid; and such a provision was also in favour of liberty, the proof of villenage, or nelfy, going back as far as 1 Ric. 1.

See also title **VILLENAGE**.

NATURAL-BORN SUBJECTS. Those who are born within the dominions, or rather within the allegiance, of the King of England.

See also title **ALLEGIANCE**.

NATURALIZATION. The making a foreigner a lawful subject of the State, or, as it is sometimes termed, the king's natural subject. Formerly, an Act of Parliament was required in each particular case to naturalise an alien; the king by his letters patent might denizenise but not naturalise. However, by the 7 & 8 Vict. c. 66, which was a General Act, it was enacted that aliens of friendly states might become naturalised British subjects upon complying with the requisites of the Act. And now, by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), further facilities of naturalization are afforded, and the important privilege of expatriation is conferred; also, the evil or inconvenience of a "double allegiance" is remedied.

See also title **ALLEGIANCE**.

NAVIGATION. The right of the public to navigate a public river is paramount to any right of property in the Crown, which never had the power, e.g., to grant a weir in obstruction of the navigation (*Williams v. Willoz*, 3 N. & P. 608). As to what is evidence of a public river, the flux and reflux of the tides is *prima facie* evidence of its being so; but the evidence is not conclusive, because a public right of navigation in such a river may have been extinguished either (a.) By legal means; e.g., an Act of Parliament, a writ of *ad quod damnum* (see that title), or an order

NAVIGATION—continued.

of commissioners of rivers; or (b.) By natural causes—e.g., a retreat of the sea or a deposit of silt and mud (*Rex v. Montague*, 6 D. & R. 616). A navigable river is a public highway for vessels at all times and states of the tide (*Colchester (Mayor) v. Brooke*, 7 Q. B. 339); and an obstruction to the navigation may be the subject either of an action or of an indictment, according to the circumstances. Similarly, the public have a right of user of a canal, which is an artificial navigable river, e.g., with boats propelled by steam power, if they do no injury to the canal beyond what would be occasioned by traction by horses. *Case v. Midland Ry. Co.*, 5 Jur. (N. S.) 1017.

NAVY: See title ARMY.

NE EXEAT REGNO (*that he leave not the kingdom*). A writ which issues to restrain a person from leaving the kingdom. This writ is frequently resorted to in Equity when one party has an equitable demand against another, and that other is about to leave the kingdom; and it is only in cases where the intention of the party to leave can be shewn that the writ is granted. F. N. B.; Gray's Ch. Pr. 16.

NEGATIVE PREGNANT. In pleading signifies the statement of a negative proposition in such a form as may imply or carry with it the admission of an affirmative. Thus, in an action of trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him licence to do so, and that he entered by that licence; to which the plaintiff replied, that he did not enter by her licence. This replication was held to be a negative pregnant, inasmuch as it might imply or carry with it the admission that a licence was given, although the defendant did not enter by that licence; and the proposition would therefore, in the language of pleading, be said to be pregnant with that admission; viz., that a licence was given. A negative pregnant is one of those faults in pleading which fall within the rule that pleadings must not be ambiguous or doubtful in meaning. In the above instance the plaintiff should have denied either the entry by itself, or the licence by itself; for the effect of denying both together was to leave it doubtful whether he meant to deny the licence, or the fact of the defendant's entry by virtue of that licence. Steph. on Pl. 408, 409, 4th ed.

NEGLIGENCE. Negligence producing damage to the plaintiff is in all cases a ground of action; but the question what shall be considered negligence for this purpose is a question for the jury, subject to

NEGLIGENCE—continued.

certain rules of law, or of common sense, according to which the measure of culpable negligence varies according as the circumstances of the cases differ. In all cases, the first point to settle is the amount or degree of diligence exigible from the defendant, for by means of that positive criterion, it is possible to ascertain in the next place the amount or degree of negligence on the defendant's part which will involve him in liability for the damage which has arisen. The rule is, that the negligence is inversely in proportion to the diligence. For example, if but slight diligence (*levis diligentia*) is exigible, then only gross negligence (*crassa negligentia*) amounting also to wilfulness or intentionality (*dolus*), will render the defendant liable, as is the case with gratuitous bailees, whether depositaries or mandataries. And, on the other hand, if extreme diligence (*exacta diligentia*) is exigible, then the slightest negligence (*levis negligentia*, or *levis culpa*) will in like manner render the defendant liable, as is the case with inn-keepers, carriers, and generally with paid bailees.

But, subject to these rules, the question is one of fact; and the mode of proof varies from the most apparent case, in which the facts speak for themselves (*res ipsa loquitur*) condemning the defendant, into the least tangible case of all, in which the judge hesitates whether or not there is any question of negligence at all which he can submit to the jury. Then, occasionally, the plaintiff has by his own negligence contributed to the damage; and, before the jury can find for him, they must be persuaded upon the evidence that the defendant's negligence was such as that the damage would have arisen at all events although the plaintiff had been ever so diligent.

NEUTRALITY. Is the condition in which a third nation is, when two other nations are at war with each other. The duties of a friendly neutrality have been considerably increased of late years, whence the Foreign Enlistment or Neutrality Act of 59 Geo. 3, c. 69, has been repealed, and a more stringent Neutrality Act, viz., the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), substituted in its place. Under that Act, which extends to all the Queen's dominions and the adjacent territorial waters, the penalty of fine and imprisonment, or of either, and with or without hard labour, is imposed upon any British subject enlisting without the licence of the Queen in the military or naval service of either belligerent, or agreeing to so enlist, or inducing others to

NEUTRALITY—continued.

so enlist, or leaving England with the intention to so enlist, or inducing others to embark with that intention, under a misrepresentation of the fact, or taking illegally enlisted persons on board, with a knowledge of the fact. And under the same Act, illegal ship-building and all particular acts assistant thereto, and all illegal expeditions generally, are subject to the like penalties, together with the forfeiture of the vessel or other materials of the expedition.

NEW ASSIGNMENT. From the very general terms in which declarations are framed, the defendant is sometimes not sufficiently guided to the real cause of complaint, and is in consequence led to apply his plea to a different matter from that which the plaintiff had in view. In such cases, a plaintiff is obliged to resort, in his replication, to a mode of pleading termed a new assignment, for the purpose of setting the defendant right. A new assignment, as the phrase imports, is an instrument in which the plaintiff assigns afresh his ground of complaint with more certainty and particularity than he had previously done in the declaration, and distinguishes the true ground of complaint from that which the defendant in his plea had assumed it to be. Thus, in an action of trespass *quare clausum fregit*, for repeated trespasses, the declaration usually states that the defendant on divers days and times before the commencement of the suit broke and entered the plaintiff's close, and trod down the soil, &c., without setting forth more specifically in what parts of the close, or on what occasions, the defendant trespassed; now it might happen that the defendant claimed a right of way over a certain part of the close, and in exercise of that right had repeatedly entered and walked over it; and it may also happen that he has entered and trod down the soil, &c., on other occasions, and in parts out of the supposed line of way, and the plaintiff, not admitting the right claimed, may have intended to apply his action both to the one set of trespasses and the other. But as from the generality of the declaration it would be consistent to suppose that it referred only to his entering and walking in that part over which he claimed the right of way, the defendant would be entitled to suppose or assume that it referred, in fact, only to his entering and walking in that line of way. He might, therefore, in his plea, allege, as a complete answer to the whole complaint, that he had a right of way by grant, &c., over the said close; and if he did this, and the plaintiff confined himself in his replication to a denial of that plea, and the defendant at the trial

NEW ASSIGNMENT—continued.

proved a right of way as alleged, the plaintiff would be precluded from giving evidence of any trespasses committed out of the line or track over which the defendant thus appeared entitled to pass. In such case, therefore, the plaintiff's course would be, in his replication, both to deny the plea, and also to new assign, by alleging that he brought his action not only for those trespasses, supposed or assumed by the defendant, but also for others committed on other occasions, and in other parts of the close out of the supposed track or line of way over which the defendant so claimed a right to pass; and such a new assignment is usually called a new assignment *extra viam*. Steph. Pl. 247, 252; Bull. & Leake, Prec. in Plead., pp. 653—657.

By the C. L. P. Act, 1852, s. 87, only one new assignment shall be pleaded to any number of pleas to the same cause of action; and such new assignment shall be consistent with and confined by the particulars (if any) delivered in the action, and shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both.

NEW TRIAL MOTION PAPER. By the practice of the Courts motions for new trials must in general be made within the first four days of term; but when from pressure of business, or other like cause, the Courts have not had time to dispose of all the applications, it is the practice to have the names of the causes and of the counsel who are instructed to move therein put into a list, called the new trial motion paper; and the motions are then heard and disposed of on the following or some subsequent day, according to the seniority of counsel appointed to move therein.

NEW TRIAL PAPER. A paper containing a list of causes in which rules nisi have been obtained for a new trial, or for entering a verdict in place of a nonsuit, or for judgment *non obstante veredicto*, or for otherwise varying or setting aside proceedings which have taken place at Nisi Prius. These are called on for argument in the order in which they stand in the paper, on days appointed by the judges for the purpose.

NEXT FRIEND. An infant sues by his *next friend* (*prochein ami*) and defends by his guardian *ad litem*. Similarly a married woman where she has an interest conflicting with that of her husband, sues by her next friend (making her husband a defendant). The name of the next friend is always mentioned in the title of the

NEXT FRIEND—*continued.*

cause or matter, and a written authority from the next friend must, in the case of a suit, be filed together with the bill (15 & 16 Vict. c. 86, s. 11). The next friend is responsible for the costs of the suit if unsuccessful.

NIGHT. As to what is reckoned night and what day, with reference to the offence of burglary, it seems to be the general opinion that if there be daylight, or *crepusculum*, enough begun or left to discern a man's face, that is considered day. And night is defined, or rather described, by some, to be when it is so dark that the countenance of a man cannot be discerned (1 Hale's P. C. 350). However, the arbitrary limit of 9 P.M. to 6 A.M. has been fixed as the period of night in prosecutions for burglary and larceny. 24 & 25 Vict. c. 96, s. 1.

NIHIL CAPIAT PER BREVE, or PER WILLAM (*that he take nothing by his writ*). The judgment given against a plaintiff either in bar of his action, or in abatement of his writ. Co. Litt. 363.

NIHIL, or NIL DEBET (*he owes nothing*). The plea to an action of debt on simple contract is commonly not indebted, or *nil debet*. However, now, by r. 11, T. T. 1853, "the plea of *nil debet* shall not be allowed in any action;" see Bull. & Leake, *Proc. Pl.* 462.

NIHIL, or NIL DICIT (*he says nothing*). When the plaintiff in an action has stated his case in the declaration, it is incumbent on the defendant, within a prescribed time, to make his defence and to put in a plea, otherwise the plaintiff will be entitled to have judgment by default or *nil dicit* of the defendant.

See title **JUDGMENT**.

NIHIL, or NIL HABUIT IN TENEMENTIS. A plea to be pleaded in an action of debt only, brought by a lessor against a lessee for years, or at will, without deed. 2 Lil. Abr. 214.

NISI PRIUS (*unless before*). The *nisi prius* Courts are such as are held for the trial of issues of fact before a jury and one presiding judge. It is in these Courts that the various disputes and differences which daily arise between man and man, and which form the subject-matter of civil actions, are heard and determined. The circumstance of the *nisi prius* Courts taking cognizance of questions of fact only arising between man and man in his civil capacity, occasions them to be frequently mentioned in contradistinction to the criminal Courts, and to the Courts sitting in *banc* or *banco* for the hearing

NISI PRIUS—*continued.*

and determining questions of law. Thus, a judge may be said to be sitting in *banc*, or at *nisi prius*; in the one case he would, in company with three other learned judges, be hearing and determining questions of law, which have been raised for the opinion of the Court; in the other, he would be presiding at the trial of some question of fact which was to be submitted to the consideration of a jury. So at the assizes, a judge is said to be sitting in the *nisi prius* Court, as distinguished from the Crown Court, wherein the trial of prisoners takes place. The same distinction prevails when speaking of the peculiar qualifications of an advocate; thus an advocate is frequently said to be a good *nisi prius* lawyer, meaning thereby, that he possesses in an eminent degree that peculiar learning, and those mental qualifications, more particularly required to attain success in the conduct and management of trials at *nisi prius*. The origin of the phrase in this application of it is in the old form of *præcipe* to the sheriff commanding him to have the persons of the jury at Westminster on such and such a day "unless sooner" (*nisi prius*) the judge should go down himself to the country to try the case there.

NOLLE PROSEQUI (*that he will not prosecute or follow up*). A *nolle prosequi* is in the nature of an acknowledgment or undertaking by the plaintiff in an action to forbear to proceed any further either in the action altogether, or as to some part of it, or as to some of the defendants. A *nolle prosequi* is different from a *non pros.*, for there the plaintiff is put out of Court with respect to all the defendants. If a plaintiff misconceives his action, or makes a mistake as to the party sued (as where he sues a *feme covert*, and she pleads coverture in bar, or the like), he may enter a *nolle prosequi* as to the whole cause of action, and proceed *de novo* in another action (2 Arch. Pract. 1512). If money be paid into Court, and the plaintiff determines on accepting that sum in satisfaction of the action, he may reply that he accepts the sum paid into Court in satisfaction of that part of the declaration to which the plea is pleaded; and if he does so, he must at the same time add a *nolle prosequi* as to the residue, otherwise the defendant may sign judgment of *non pros.* But if he accepts the sum in satisfaction of part only of his action, namely, of that part to which the plea of payment into Court is pleaded, then he must reply to the other pleas of the defendant. Day's Com. Law. Pract. 110.

NOMINATION TO A LIVING. The rights of nominating and of presenting to

NOMINATION TO A LIVING—*contd.*

a living are distinct, and may reside in different persons. Presentation is the offering a clerk to the bishop. Nomination is the offering a clerk to the person who has the right of presentation. Thus, one seized of an advowson may grant to A. and his heirs that whenever the church becomes vacant, he will present such a person as A. or his heirs shall nominate. He who has the right of nomination is, to most purposes, considered as the patron of the church. Plowd. 529; Rog Ecc. Law, 5.

NON-AGE. Under twenty-one years of age in some cases, and under fourteen or twelve in others.

See titles AGE; INFANTS.

NON ASSUMPSIT (*he hath not promised*). The name of a plea which occurs in the action of *assumpsit*, by which the defendant denies that he undertook, or promised, to do the thing which the plaintiff in his declaration alleges that he did undertake and promise to do; and this plea operates as a denial, in point of fact, of the existence of any express promise of the fact alleged in the declaration, or of the matters of fact from which the promise alleged would be implied by law. Steph. on Plead. 170, 180.

NON ASSUMPSIT INFRA SEX ANNOS (*he has not promised within six years*). There are certain periods limited by law within which actions must be brought. In an action of *assumpsit* the period is six years; if, therefore, any person commences such an action for anything which did not accrue or happen within such period of six years, the defendant may plead *non assumpsit infra sex annos*, i.e., he made no such promise within six years, which plea is an effectual bar to the complaint; and the defendant in such case is said to plead the Statute of Limitations.

NON CEPIT (*he has not taken*). A plea which occurs in the action of replevin, in which action the plaintiff alleges in his declaration that the defendant "took certain cattle or goods of the plaintiff in a certain place called, &c.," and this plea states that he did not take the said cattle or goods "in manner and form as alleged," which involves a denial both of the taking and of the place in which the taking was alleged to have been; the place being a material point in this action. Steph. on Plead. 185.

NON-CLAIM. The omission or neglect of him who ought to claim his right within the time limited by law; as within a year and a day where a continual claim was required, or within five years after a fine had been levied. *Les Termes de la Ley*.

NON COMPOS MENTIS. Not master of his wits; in other words, of unsound mind.

See title LUNACY.

NON CONSTAT (*it does not appear*). It is by no means clear or evident; a phrase used in general to state some conclusion as not following, although it seems, *prima facie*, to follow.

NON DAMNIFICATUS (*not damaged or hurt*). This is a plea in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," &c.; it is in the nature of a plea of performance, being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified according to the tenor of the condition. Steph. on Plead. 388.

NON DECIMANDO (*not paying tithes*). A custom or prescription of *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them.

See also title MODUS DECIMANDI.

NON DETINET (*he does not detain*). A plea which occurs in the action of detinet, by which the defendant alleges that he did not detain "the said goods" in the plaintiff's declaration specified, &c. It operates therefore as a denial of the detention of the goods in question by the defendant. Steph. on Plead. 175.

NON EST FACTUM (*it is not his deed*). A plea which occurs in the action of debt on bond or other specialty, and also in covenant. In this plea the defendant denies that the deed mentioned in the declaration is his deed (Steph. on Plead. 169, 172). By r. 10; T. T. 1853, in actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable.

NON EST INVENTUS (*he is not found*). When a writ is directed to the sheriff commanding him to arrest the defendant, and he is unable to do so because he cannot find him, he returns the writ with an indorsement on it to that effect, and this is technically called a return of *non est inventus*. However, this return is necessarily now little in use, since the facility of imprisonment for debt, and almost the practice itself of such imprisonment, have been done away with.

See title IMPRISONMENT FOR DEBT.

NON-FEASANCE (*non-performance*). The omitting to do what ought to be done, e.g., where a gratuitous bailor simply refuses to enter upon the agency, and for which mere non-feasance he is held to be not liable. *Bulfe v. West*, 13 C. B. 466.

See also title **MISFEASANCE**.

NON-JOINDER. The not joining of any person or persons as a co-defendant or co-plaintiff. It may be further illustrated by the following passage from Tidd's Practice: "In actions upon contracts, where there are several parties, the action should be brought by or against all of them, if living, or if some are dead, by or against the survivors; and if an action be brought by one of several parties on a joint contract made with all of them, the non-joinder may be pleaded in bar," i.e., the fact of all the parties to the contract not having been joined in the action may be pleaded in bar. Tidd's New Pract. 318.

NON OBSTANTE VEREDICTO (*notwithstanding the verdict*). When the defence of the defendant in an action put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the Court, upon motion, will give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case be very clear; and this is called judgment *non obstante veredicto*. 2 Arch. Pract. 1551.

NON PROS., or **NON PROSEQUITUR** (*he does not prosecute or follow up*). If in the proceedings of an action at law the plaintiff neglects to take any of those steps which he ought to take within the time prescribed by the practice of the Courts for that purpose, the defendant may enter judgment of *non pros.* against him, whereby it is adjudged that the plaintiff does not follow up (*non prosequitur*) his suit as he ought to do, and therefore the defendant ought to have judgment against him. Smith's Action at Law, 96.

NONSUIT (*non est prosecutus*). A renunciation or giving up the suit by the plaintiff; and this is usually done on his discovering some error or defect, or when he finds that his evidence is not sufficient to maintain his case. The stage of the proceedings at which a plaintiff is nonsuited is usually just before the judge has summed up, but it may be done at any time before the jury have delivered their verdict. It is, however, entirely optional with the plaintiff whether he will submit to a nonsuit or not; he cannot be compelled to do so, but may insist on the case going to the jury, and take his chance of the verdict. In cases, however, where it is doubtful whether the verdict will be a favourable one, it is usual for the plaintiff to choose

NONSUIT—continued.

(or elect, as it is termed) to be nonsuited, because after a nonsuit he may commence another suit against the defendant for the same cause of action, which may be advisable if he can come better prepared with evidence, or can otherwise repair the defect which was the cause of his failure; but if a verdict be once given, and judgment follow thereon, he is for ever barred from suing the defendant upon the same ground of complaint. 1 Arch. Pract. 409, 441; Steph. on Plead. 120.

NON SUM INFORMATUS (*I am not informed*). Judgment by default is either by *nil dicit*, that is, where the defendant is stated to have appeared, but to have said nothing in bar or preclusion of the action; or by *non sum informatus*, where he is said to appear by attorney, but the attorney says that he is not informed by the defendant of any answer to be given. This latter is used only in cases where judgment is entered in pursuance of a previous agreement between the parties. *Les Termes de la Ley*.

NOTARY. In ancient times a notary was a scribe or scrivener, who took minutes and made short drafts of writings and instruments, both of a public and private nature. In the present day, however, he is called a notary public, who confirms and attests the truth of any deeds or writings, in order to render the same available as evidence of the facts therein contained in any other country. Some of the chief duties of notaries are connected with mercantile transactions, as in noting bills of exchange and promissory notes which have been presented for payment and dishonoured, the noting of a foreign bill being, like the notice of dishonour of an inland bill, a necessary preliminary to bringing an action upon it against the indorsers and (usually) against the drawer.

NOTE OF A FINE. The note of a fine was an abstract of the writ of covenant and concord, naming the parties, the parcels of land, and the agreement.

See also title **FINE**.

NOTE, PROMISSORY: See title **PROMISSORY NOTE**.

NOT GUILTY. A plea which occurs in the action of trespass or trespass on the case *ex delicto*, by which the defendant denies being guilty of the trespasses, &c., laid to his charge in the plaintiff's declaration. When a defendant pleads not guilty in a criminal charge he thereby puts himself upon trial, and is entitled to all the chances of escape from conviction which the rules of law afford him in case of the

NOT GUILTY—continued.

evidence being doubtful, or from any other cause, notwithstanding he may in fact have committed the act which is usually taken to constitute the offence. An accused person is, therefore, in all cases justified in pleading not guilty to a criminal charge. On the other hand, in civil cases, when a defendant pleads not guilty he is said to plead the general issue, whereby he is taken to deny the gist of the action only. For example, in actions for torts the plea of not guilty operating as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant; it follows that in an action for a nuisance to the occupation of a house by carrying on an offensive trade the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, but will not operate as a denial of the plaintiff's occupation of the house. And again, in an action for slander of a plaintiff in his office, or profession, or trade, the plea of not guilty will operate as a denial of speaking the words, of speaking them maliciously and in the defamatory sense imputed, and with reference to the plaintiff's office, or profession, or trade, but will not operate as a denial of the fact of the plaintiff holding the office, or profession, or trade alleged. See *Smith's Action at Law*, p. 533.

NOTICE. This is a head of equity of great importance in the two principal respects following, namely:—

- (1.) As perfecting the assignment of *choses in action*; and
- (2.) As affecting or not affecting subsequent interests.

But in regard to both these branches notice may be either actual or constructive, with this difference, that actual notice is the more common of the two in respect of the former branch, and constructive notice the more common in respect of the latter. For, firstly, actual notice is any express intimation given by a person interested, or claiming to be interested, in the *chose in action* to the person having present control over it, on purpose to bind him as to such control, and thereby to complete, as far as possible, the rights of the person giving the notice. And, secondly, constructive notice is notice implied or inferred from the proof of surrounding circumstances,—an insecure form of notice, which the person claiming a *chose in action* should in no case rely upon. Notice has been inferred from two states of circumstances in particular, viz., (1.) Where actual notice of some general charge has been

NOTICE—continued.

given, and if the fact had been inquired into, the person receiving such notice would have been naturally led on to notice of other things, but he has neglected all inquiry, wherefore of these latter he is taken to have had constructive notice; and (2.) Where the circumstances are such as shew the person charged with constructive notice to have wilfully, and not negligently merely, abstained from inquiry for the purpose of avoiding notice. For the first species of constructive notice see *Biscoe v. Banbury (Earl)* (1 Ch. Ca. 287); and for the second species, *Birch v. El-lames*, (2 Anstr. 427). And there is a third species of constructive notice arising from the relation of the parties, as being that of principal and agent, client and solicitor, and such like, where the transaction is either contemporaneous with, or shortly subsequent to, another transaction communicating notice (*Fuller v. Bennett*, 2 Hare, 394), the subject matter of the notice having been a material part of the earlier transaction. *Wyllie v. Pollen*, 32 L. J. (Ch.) N. S. 782.

Considering the subject of Notice in its two branches,—and, Firstly, Notice as perfecting the assignment of *choses in action*. In order that third parties may be bound it is necessary, with regard to a *chose in action*, to give notice to the person in whose hands it is, or when realising itself will be, such notice being, in the case of a *chose in action* which does not admit of actual delivery, precisely equivalent in its effect to the actual delivery of a chattel in possession which admits of delivery (*Ryall v. Rowles*, 1 Ves. 348). Therefore,

(a.) In order to take a *chose in action* out of the order and disposition of the creditor in case of his bankruptcy it is necessary to give notice to the debtor. *Ryall v. Rowles*, *supra*.

(b.) In the case of a policy of assurance notice must be given to the insurance office. *Thompson v. Tomkins*, 2 Dr. & Sm. 8.

(c.) In the case of an assignment of freight notice must be given to the charterer. *Brown v. Tanner*, L. R. 2 Eq. 806.

(d.) In the case of an assignment of a legacy, general or specific, the executors not having yet assented to it, notice to the executors must be given. *Browne v. Savage*, 4 Dr. 635.

(e.) In the case of an assignment of the costs of a suit not yet ordered to be paid notice should be given to the trustees or other the parties to whom they will be payable. *Day v. Day*, 1 D. & J. 144.

(f.) In the case of an assignment of shares in a company notice must be given to the company. *Ex parte Boulton*, 1 D.

NOTICE—continued.

& J. 163; and see generally the cases of *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1, 30.

If such notice has been given, as soon as the assignee knows to whom the same is to be given, the assignee, if not otherwise in default, will not lose the benefit of it (*Feltham v. Clark*, 1 De G. & Sm. 307), upon the maxim, *lex neminem cogit ad vana seu inutilia peragenda*.

Where for any reason notice cannot be given, then the assignee must perfect his title in some other way; e.g., where the sole trustee of stock has died without legal representatives a *distringas* should be served on the Bank of England (*Etty v. Bridges*, 1 Y. & C. Ch. 486); and where a fund is in Court, a stop-order over it should be left at the Paymaster General's Office (*Greening v. Beckford*, 5 Sim. 195; Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), and rules thereunder), a mere notice to the Paymaster-General being insufficient (*Warburton v. Hill*, Kay, 470); but a notice to the trustees (if any) before payment into Court would be good against a stop-order subsequently obtained. *Livesey v. Harding*, 23 Beav. 141.

Chattel interests in real estate, being equitable, are not *chooses in action* within the meaning of the rules above stated (*Wiltshire v. Babbitts*, 14 Sim. 76); and being legal, the law will of course prevail without regard to the question of notice. But the proceeds of the sale of real estate are not a chattel interest in real estate. *Lee v. Howlett*, 2 K. & J. 531.

And, Secondly, Notice as affecting or not affecting subsequent interests. A purchaser for value without notice of a prior equitable estate or interest, and, *a fortiori*, of a mere equity, obtaining the legal estate either at the time of his purchase or subsequently thereto, and apparently, whether by fair means or by a fraud (*Culpepper's Case*, Freem. 123; *Pilcher v. Rawlins*, L. B. 7 Ch. App. 259), is entitled to priority in Equity as well as at Law; but not in case of a breach of trust (*Saunders v. Deheus*, 2 Vern. 271). But the legal estate, where it is obtained fraudulently, must have been actually obtained, —i.e., conveyed (*Eyre v. Burmester*, 10 H. L. C. 90); although, where it may be obtained by fair means and without fraud the right to a conveyance of it is sufficient (*Willoughby v. Willoughby*, 1 T. R. 763). And even where a purchaser for value without notice neither has the legal estate nor the best right to call for it, Equity will do nothing to prejudice him upon the application of an adverse party asking the aid of Equity (auxiliary jurisdiction) (*Burlace v. Cook*, Freem. 24); although, upon the

NOTICE—continued.

application of an adverse party asking his legal rights (concurrent jurisdiction), and not merely the assistance of the Court of Chancery towards establishing these rights at Law, Equity is bound and compellable to declare and decree him his rights, however much to the prejudice of the purchaser for value (*Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & My. 284); and with reference to the rights of a prior legal mortgagee see *Finch v. Shaw*, *Collyer v. Finch*, 19 Beav. 500). And as between persons who are successive equitable claimants, Equity takes them according to their priorities of date, without regard to notice or the absence of notice (*Phillips v. Phillips*, 31 L. J. (Ch.) 325), unless in the case of the gross negligence of a prior claimant being the occasion of the prejudice sustained by a subsequent one. *Rice v. Rice*, 2 Dr. 73.

On the other hand, a purchaser for value with notice of a prior equitable estate, or interest, or even of an equity, cannot, by getting in the legal estate, whether at the time of, or subsequently to, his purchase, and whether by fair means or fraudulent, obtain priority over such prior claim, but the purchaser will in such a case be held a trustee for the prior claimant to the extent of such prior claim (*Birch v. Ellames*, 2 Anst. 427). And notice will bind the subsequent purchaser, even although the prior charge is defective, or would even (as from neglect to register or re-register) be void at Law (*Le Neve v. Le Neve*, Amb. 436); although conversely the absence of notice will save him, even although the prior charge be registered (*Morecock v. Dickens*, Amb. 678), unless in Ireland (6 Anne, c. 2), or with reference to British ships (*Hughes v. Morris*, 2 De G. M. & G. 349); the same rules apply to subsequent mortgagees; but with reference to judgment creditors the following peculiar rules have been established:—

(a.) Judgment creditors, as between themselves, take rank according to the order of the dates of their several registrations, without regard to the question of notice, which as between them is immaterial. *Benham v. Keane*, 1 J. & H. 685; 3 & 4 Vict. c. 82, s. 2.

(b.) An unregistered judgment does not affect a subsequent purchaser for value or mortgagee, and here also without regard to the question of notice. *Benham v. Keane*, 1 J. & H. 685; 18 & 19 Vict. c. 15, s. 5.

(c.) An unregistered judgment affects a subsequent *cestui que trust* having notice of it. *Benham v. Keane*, *supra*.

(d.) A registered judgment which has been also duly re-registered affects a subsequent purchaser for value or mortgagee

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having notice of it (*Simpson v. Morley*, 2 K. & J. 71); but not a subsequent purchaser for value or mortgagee not having notice of it. *Robinson v. Woodward*, 4 De G. & Sm. 562.

(e.) A registered judgment which has been otherwise duly perfected does not affect a purchaser whose contract is prior in date to the judgment, although the conveyance should be subsequent (*Brown v. Perrott*, 4 Beav. 585), without reference to the question of notice.

(f.) A registered judgment which has been otherwise duly perfected does not affect a prior voluntary settlement (*Beavan v. Oxford (Earl)*, 6 De G. M. & G. 507); and, *à fortiori*, does not affect a prior purchase for value or mortgage, without reference to the question of notice. And see title JUDGMENT DEBTS.

And with reference to *tacking* the following peculiar rules have been established as between mortgagees and judgment creditors:—

(a.) If one who is a judgment creditor to begin with buys in a first mortgage, he shall not tack the judgment to that mortgage so as to gain a priority over a second mortgagee who was such at the date of his judgment, and without reference to the question of notice. *Brace v. Marlborough (Duchess)*, 2 P. Wms. 491.

(b.) If one who is a first legal mortgagee to begin with buys in or obtains a judgment for a further sum, and had no notice of any subsequent charge at the time of getting hold of such judgment, he shall tack the judgment to his mortgage and obtain priority over the subsequent charge. *Brace v. Marlborough (Duchess)*, *supra*.

And with reference to the successive assignees of *choses in action* the following rules have been established:—

(a.) As between two or more particular assignees (being of course equitable),

(aa.) If both or all the notices are given before the *choses in action* has realised itself, so as to be ready to be delivered actually, in the form of money or other proceeds, then priority of notice gives no priority of title. *Buller v. Plunkett*, 1 J. & H. 441. But

(bb.) If otherwise, the successive dates of the successive notices establish the successive priorities, or the one priority, as the case may be, this being the general effect of notice in such cases.

(b.) As between the trustee in bankruptcy or a general assignee on the one hand, and a particular assignee on the other, by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, the property of the bankrupt which vests in his trustee for division among the creditors of the bank-

NOTICE—continued.

rupt comprises (among other things) (1.) All such property as may belong to, or be vested in, the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him during its continuance; and (2.) All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; but it is provided that things in action other than debts due to the bankrupt in the course of his trade or business shall not be deemed goods and chattels within the meaning of this order and disposition clause; and in the first schedule to the Act the word "trader" is made to include the occupations specified in that schedule. Now, subject to that section, and so far as it may not have altered the previous law, the following rules have been established as between a trustee in bankruptcy or general assignee on the one hand, and a particular assignee on the other:—

(aa.) If the particular assignee were of a date prior to the bankruptcy of the debtor, and had also given notice prior thereto, he retained his priority, but failing such notice lost it, in favour of the trustee in bankruptcy or general assignee who gave notice, the particular assignment not being fraudulent; .

(bb.) If the particular assignee was of a date posterior to the bankruptcy of the debtor, but had given notice of his assignment before the trustee in bankruptcy or general assignee had given notice of the bankruptcy or general assignment, the particular assignee (the particular assignment not being fraudulent) acquired priority over the trustee in bankruptcy, or general assignee, who had omitted to give such notice (*In re Barr's Trusts*, 4 K. & J. 219; *In re Atkinson*, 2 De G. M. & G. 140); but by the Bankruptcy Act, 1849, s. 141, and the decision in *Re Mary Coombe* (1 Giff. 91), he was deprived of such priority over the trustee in bankruptcy; but having regard to ss. 92, 94, and 95 of the Bankruptcy Act, 1869, the same general rules as applied before the Bankruptcy Act, 1849, and the last-mentioned decision seem to have been restored in all cases where the particular assignment, although subsequent to the commencement of the bankruptcy, is prior to the date of the order of adjudication, subject only to the limitation imposed by s. 15 of the Bankruptcy Act, 1869, stated above. The subsequent particular assignee who gives notice still has priority over a prior general

NOTICE—continued.

assignee who omits to give notice; but in *Lloyd v. Banks* (L. R. 3 Ch. 488), where the trustee of a fund had notice of an insolvency from the newspapers merely, and acted on the information thereby obtained, a subsequent particular assignee of the *cestui que trust* was held not to acquire priority over the general assignee in insolvency.

And in all these cases notice before actual payment of the purchase-money, whether or not the notice be also before the contract, and whether before or after the conveyance is executed, is binding upon the subsequent purchaser or mortgagee (*Tourville v. Naish*, 3 P. Wms. 307); and even where notice is not given until after payment of the purchase-money, provided the conveyance has not yet been executed, the purchaser or mortgagee is equally bound (*Wigg v. Wigg*, 1 Atk. 382). Therefore the only notice which the purchaser or mortgagee may disregard is notice coming to him both after payment of the purchase or mortgage money and after execution of the conveyance.

But a subsequent purchaser or mortgagee of lands with notice of a prior voluntary settlement may safely disregard it, such settlement being void against him under the 27 Eliz. c. 4 (*Doe v. Manning*, 9 East, 59); and the purchaser may even compel a specific performance of the contract (*Daking v. Whimper*, 26 Beav. 568). The benefit of the stat. 27 Eliz. c. 4, does not, however, extend to one who purchases or takes a mortgage of lands from the heir-at-law or devisee of the voluntary settlor, or from a person claiming under a subsequent voluntary settlement, or indeed from any person other than the voluntary settlor himself. *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035.

NOTICE OF ACTION. When it is intended to sue certain particular individuals it is sometimes, as in the case of actions against justices of the peace, necessary to give them notice of the action some time, usually one month, before.

NOTICES OF OBJECTIONS TO PATENT.

By the 5 & 6 Will. 4, c. 83, s. 5, it is provided, that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made on behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections

NOTICE OF OBJECTIONS OF PATENT—continued.

stated in such notice. The object of this notice, or particular of objections, as it is sometimes called, is to point out to the plaintiff the real nature of the objections to the patent which the defendant intends to set up upon the trial as an answer to the plaintiff's action, in order that the plaintiff may be prepared with the necessary evidence to meet such objections. It is somewhat analogous to a particular of set-off, and, like it, is rendered necessary on account of the generality of the defendant's pleas.

See also title **PATENTS**.

NOTICE TO PRODUCE. In general notice to produce any document in the possession or power of the opposite party is required; and such notice must be given in order to the admission of secondary evidence of the contents of the document (*Reg. v. Elworthy*, L. R. 1 C. C. R. 105). But where, from the nature of the proceedings, as in the case of trover for a bond, the party in possession of the document necessarily has notice that he is to be charged with the possession of it, a notice to produce is unnecessary (*Hov v. Hall*, 14 East, 274). Also, a counterpart executed by the defendant may be read by the plaintiff without a notice to produce the original (*Burleigh v. Stibbs*, 5 T. R. 465); and in an action for seamen's wages, secondary evidence of the ship's articles is admissible under 17 & 18 Vict. c. 104, s. 164, without any notice to produce them.

Generally, however, a notice to produce any notice on which the action is founded is unnecessary; but it is usual in business to have two copies of the notice to produce, and to serve one and retain the other, indorsing on the latter the time and mode of the service of the former. And now by the C. L. P. Act, 1852, s. 119, where there has been a notice to admit the notice to produce, an affidavit of the attorney or his clerk of the service of the notice to produce and of the time when served, with a copy of it annexed, is sufficient evidence of the service of the original and of the time of service.

NOTICE TO QUIT. As between landlords and tenants, where there is no express stipulation as to the length of notice to quit the tenements occupied by the tenant, it is a general presumption of law that in the case of tenancies from year to year a half-year's notice must be given, such notice to expire at the end of the current year of the tenancy (*Bridges v. Potts*, 17 C. B. (N.S.) 332). And in the case of quarterly, monthly, and weekly tenancies, the safest course is to give a notice corresponding to

NOTICE TO QUIT—continued.

the tenancy, but there is hardly any rule of law upon the subject. The like rules apply as to the tenant giving notice to determine his tenancy, which also is sometimes abusively called a notice to quit. The notice may be afterwards waived, e.g., by the landlord's subsequently distraining for rent.

NOVATION. The acceptance of a new debt or obligation in satisfaction of a prior existing one. Thus, it is said that a surety is discharged by the novation of the debt; for he can no longer be bound for the first debt, for which he was surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt was not the debt to which he acceded.

A novation may arise in either of two ways:—

(1.) As in the case of a *renewal bill*, where the person of the debtor remains the same, but the amount or terms are increased or altered;

(2.) As in the case of an *amalgamation of companies*, where the person of the debtor is altered, but the other terms of the contract remain the same, the new company which is substituted for the old one taking over all the liabilities (together with the rights) of the latter.

It is essential to every *novatio* that the creditor should have assented thereto.

Justinian (in his Institutes iii. 29 (30), *Quibus Modis Obligatio Tollitur*, s. 3) enacted, that, unless the parties expressly stated in the writing that their intention was to make a *novatio*, the new obligation, although substituted for, should not put an end to, the old obligation, but the creditor should have the benefit of both securities. But this is not the rule of the English Law.

NOVEL DISSEISIN (*a new or recent disseisin, or dispossession*): See title ASSIZE or NOVEL DISSEISIN.

NUDUM PACTUM (*a bare agreement*). An agreement to do or pay anything on one side, without any consideration or compensation therefor on the other. This is thence called a nude or naked contract (*nudum pactum*), and when not under seal is totally void in law, and a man cannot be compelled to perform it upon the maxim, "*Ex nudo pacto non oritur actio*." Pacts performed a great part in Roman Law, and it was a rule of that law that a *nudum pactum*, although not sufficient (in general) to support an action, was always sufficient to furnish an exception, i.e., plea or defence.

See title PACTS.

NUISANCE (from the Fr. *nuire*, to hurt).

Any thing which unlawfully annoys or does damage to another is a nuisance. A nuisance is either public or private. A public or common nuisance is such as affects or interferes with the king's subjects in general; a private nuisance is such as only affects or interferes with an individual in his individual capacity. A private nuisance may be remedied by action, or in some instances by abatement (*see* that title); a public nuisance producing private damage by action, or (making the Attorney-General a party) by information in Chancery or by indictment at Common Law.

NUL TIEL RECORD (*no such record*). A plea pleaded in that form of trial which is called trial by the record. This form of trial is only used in one particular instance, and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads "*nul tiel record*," i.e., that there is no such matter of record existing; whereupon issue is joined, which is called an issue of *nul tiel record*, and in such cases the Court awards a trial by inspection and examination of the record. Stephen on Pleading, 112.

NUN: See title MONK.

NUNC PRO TUNC (*now for then*). When a party has omitted to take some step which he ought to have taken, as to file an affidavit, or to enter up judgment, for instance, the Court will sometimes permit him to do it after the proper time has passed by for that purpose, and will allow it to have the same effect as if it had been regularly done; and this in the case of the affidavit is called filing it *nunc pro tunc*; or in the case of entering up judgment, is called entering it *nunc pro tunc*; i.e., doing it now for (or instead of) then. By r. 56, H. T. 1853, all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent to the Court or a judge to order a judgment to be entered *nunc pro tunc*. Under this rule, a judgment is frequently allowed to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court, and usually in the case of the death of a party, e.g., if a party dies after special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument and pending the time taken for argument, or whilst the Court is considering of its

NUNC PRO TUNC—*continued.*

judgment. No such indulgence is given where the neglect to enter up judgment is attributable to the *laches* of the plaintiff or of those representing him, or by reason of any proceeding in error, or the like. The right to order judgment to be entered *nunc pro tunc* belongs even at Common Law to the Court.

NUNCUPATIVE WILL (*testamentum nuncupatum*). A will which depends merely upon oral evidence, having been declared or dictated by the testator previous to his death, before a sufficient number of witnesses, and afterwards reduced to writing. All wills, however, must now be reduced into writing at the time they are made (1 Vict. c. 26, s. 1). In the interval between the Statute of Frauds (29 Car. 2, c. 3) and the New Wills Act (1 Vict. c. 26) nuncupative wills were good for estates not exceeding £30 in all, where the will was pronounced before three witnesses and was reduced into writing within six days after it was made, or was proved within six months of the making; but before the Statute of Frauds they were valid without limit as to estate, just as they always were in Roman Law if made in the presence of seven witnesses. Just. ii. 10, 14.

NUPEE OBIT (*he died lately*). A writ that lay for a co-heir who had been de-forded by her co-parcener of lands or tenements, of which their grandfather, father, brother, or other common ancestor had died seised in fee simple. F. N. B. 197; Cowel.

NURTURE (*Guardians for*). Are the father or mother until infants attain the age of fourteen years; and in default of father or mother, the ordinary in former times usually assigned some discreet person to take care of the infant's personal estate, and to provide for its maintenance and education. But this duty is now discharged by the Court of Chancery, which appoints a guardian for that purpose.

See titles GUARDIANS; INFANTS.

O.

OATHS. Have been very generally in use as a security that a witness will speak the truth; but in recent times, in the case of persons holding conscientious views of the impropriety of oaths, a solemn promise or declaration that they will speak the truth, and the whole truth, has been substituted for them (33 & 34 Vict. c. 49). Since the case of *Omychund v. Barker* (1 Atk. 21) it has been usual in England to

OATHS—*continued.*

swear each witness according to the forms of his own religion, the English form being upon the Holy Gospels. Before an oath can be administered, it must be shewn if any doubt of the fact should exist, that the witness is aware of the sanctity of the oath, or generally that God will punish falsehood. Oaths have, however, been the subject of considerable abuse in law, particularly the so-called *Decisory Oath*, which in the absence of other evidence to the contrary, was permitted to settle the question in dispute; also, the so-called *Suppletory Oath*, which was administered by the judge, and was allowed to have a similar effect.

OBLIGATION (*obligatio*). An obligation or bond is a deed whereby a person obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at an appointed day; and he who so obliges himself, or enters into such a bond, is termed the obligor, and the party to whom he so obliges, or binds himself, is termed the obligee.

Such is the use of the term "obligation" in English Law; but the word is commonly used in a much more general sense in jurisprudence as denoting any liability incurred by one person to another in virtue either of an agreement of the parties or their disagreement; and an obligation is said to arise either *ex contractu* or *quasi so*, or *ex delicto*, or *quasi so*.

Again, obligations are of many varieties,—being either first perfect (i.e., actionable, *civiles*) according to the laws of the particular country, or secondly, imperfect (i.e., *naturales*, or moral) according to the same laws. And as a general rule, all systems of law (other than the English Law) allow to such latter varieties of obligation a partial legal efficacy, e.g., making them good by way of defence to an action at any rate. For the effects which the Roman Law allowed them, see Brown's *Savigny*, title *Naturalis Obligatio*.

OBLIGATION SOLIDAIRE. This, in French Law, denotes joint and several liability in English Law, but is applied also to the joint and several rights of the creditors parties to the obligation.

OCCUPANCY is defined to be the "taking possession of those things which before belonged to nobody;" hence the title which a person so acquires in things is called title by occupancy. Occupancy is frequently divided into general and special occupancy. General occupancy occurred where a person was tenant *pur autre vie*, and died during the life of the *cestui que vie*, in which case the person who first

OCCUPANCY—*continued.*

entered on the land after his death might lawfully retain possession thereof, as long as the *cestui que vie* lived by right of occupancy, because it belonged to nobody. Special occupancy occurred where an estate was limited to a man and his heirs, or the heirs of his body, during the life of another person, by which the heir or heirs of the body of such grantee might enter on the death of the ancestor, and hold possession as special occupant, having an exclusive right, by the terms of the original contract, to occupy the lands during the residue of the estate granted. General occupancy, in the sense before described, was abolished by the Statute of Frauds, and the remnant of the estate was made distributable among the creditors (if any), and the surplus remaining over was (after 14 Geo. 2, c. 20) to be distributed among the next of kin of the deceased grantee. The whole law is now regulated by the 1 Vict. c. 26, which re-enacts the provisions of both the last-mentioned two statutes as regards occupancy.

Occupancy, in a larger sense, has played a great part in international law and in jurisprudence. In international law, it is regarded as the title to the ownership of newly-discovered countries, and also (under the particular name of hostile capture) as the title to the ownership of newly-conquered countries. In jurisprudence, it is put forward, at least very commonly, as the foundation and origin of all property, whether in lands or in goods; but an objection is taken to it as such in Maine's *Ancient Law*, upon the ground that occupancy, in order to be a foundation of property, is an *advised* taking possession of a thing, and the notion of advisedness is too abstract for an early age. Probably, this objection refutes itself; and, after all, to quote the words of Savigny, property has had its origin in "adverse possession ripened by prescription."

ODIO ET ATIA. An old writ which was directed to the sheriff to inquire whether a man committed to prison on suspicion of murder was committed on just cause of suspicion, or only out of malice. And if upon an inquisition it were found that he was not guilty, then another writ was directed to the sheriff to bail him. *Les Termes de la Ley.*

OFFENCE (*delictum*). Offences are either capital or not capital; capital offences are such as draw down the punishment of death on the offender, such as high treason, felony, &c. Offences not capital are those of a less important nature, and which are generally termed misdemeanors.

OFFICE (*officium*). An office is defined to be the right to exercise a public or private employment, and to take the fees and emoluments belonging thereto; and it is considered in law a species of incorporeal hereditament.

See also next title.

OFFICE, INQUEST OF. An inquisition or inquest of office is an inquiry made by the king's officer, his sheriff, coroner, or escheator, by virtue of his office (*virtute officii*), or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods, or chattels, &c. This inquiry is made by a jury formed of an indefinite number of persons; it used frequently to be made during the existence of the military tenures, but is now grown almost out of use. For further information on this subject, *see* titles *INQUEST*; and *INQUISITION OF OFFICE*.

OFFICIAL, or OFFICIAL PRINCIPAL.

This was the name given to a judicial officer of high ecclesiastical authority in the province of Canterbury, and who was appointed by and under the authority of the archbishop. He had extraordinary jurisdiction in almost all ecclesiastical causes, and all appeals from bishops and their surrogates were directed to him. His ordinary jurisdiction extended throughout the whole province of Canterbury; but his citation, except upon appeal, or by letters of request, was confined to his own diocese. This office was at one time separate from that of the Dean of the Arches' Court of Canterbury; but as the two Courts met at the same place (formerly Bow Church, *de Arcubus*), and the Dean of the Arches frequently performed the duties of the official, in the course of time they became, and ever afterwards remained, completely united and identified. The Court of the Official Principal was therefore called the Arches Court of Canterbury, and was of very ancient origin, having subsisted before the time of Henry II. It was held in the hall belonging to the College of Civilians, or Doctors of the Civil Law, at Doctors' Commons. The duties of the Official Principal, or Dean of the Arches, are now discharged by the Judge of the Court for Ecclesiastical Causes, an office which is at present combined with that of the Judge of the High Court of Admiralty.

See title COURT OF ARCHES.

OFFICIO, OATH EX. An oath formerly administered to persons by which they might be compelled to confess, accuse, or purge themselves of any criminal matter

OFFICIO, OATH EX—*continued.*

or thing by which they might be liable to any censure or punishment. This oath was made use of in the Spiritual Courts as well in criminal cases of ecclesiastical cognizance, as in matters of civil right, but was abolished with the High Commission Court by stat. 16 Car. 1, c. 11.

See title HIGH COMMISSION COURT.

OLERON, LAWS OF. The laws made by Richard I., when at Oleron, relating to maritime affairs. *Les Termes de la Ley*: Co. Litt. 260.

ONUS PROBANDI. This means the Burden of Proof. It is a general rule that he who asserts a fact is bound to prove it; and it is not ordinarily required to prove a negative, *ei qui dicit non qui negat incumbit probatio*. But what is at first sight a negation may be in reality an affirmative assertion, and in respect of it the *onus probandi* would rest on the person asserting it (*Williams v. E. I. Co.*, 3 East, 193), unless the matter was peculiarly within the knowledge of the other party, *e.g.*, killing game without being duly qualified (*Spicer v. Parker*, 1 T. R. 144), or selling beer without a licence. *R v. Harrison*, Paley, Conv. 45, n.

The *onus probandi* may be shifted by some presumption of law, *e.g.*, by the presumption of innocence (*Williams v. E. I. Co.*, *supra*); or of legitimacy (*Banbury Peerage Case*, 2 Selw. N. P. 709); or of value in the case of an acceptance to a bill (*Mills v. Barber*, 1 M. & W. 425); or of sanity (*Sutton v. Sadler*, 26 L. J. (C.P.) 284); however, in numerous cases of a criminal nature, the Legislature has expressly enacted that the burden of proving authority, consent, lawful excuse, and the like, shall lie on the defendant, *e.g.*, in the case of a person being found by night with implements of housebreaking. 24 & 25 Vict. c. 96, s. 58.

A test frequently, but not always, available for determining upon whom the burden of proof rests, is,—to ask which party would succeed if no evidence were given on either side, and then the *onus probandi* will rest upon the other party (*Mills v. Barber*, 1 M. & W. 427). For example, in an action for not executing a contract in a workmanlike manner, the *onus* rests on the plaintiff (*Amos v. Hughes*, 1 M. & Rob. 464). Wherefore, usually, the party on whom the *onus probandi* lies, as developed on the record, must begin; and the right to begin is conversely a test of the party on whom the *onus probandi* rests. And yet in certain cases the right to begin is in the plaintiff, while the *onus probandi* lies on the defendant, or, *vice versa*, as in cases where a plaintiff seeks

ONUS PROBANDI—*continued.*

unliquidated damages in an action for libel or slander, or even of covenant or assumption. *Mercer v. Whall*, 5 Q. B. 447.

OPENING A COMMISSION. Entering upon the duties under a commission, or commencing to act under a commission, is so termed. Thus the judges of assize and *nisi prius* derive their authority to act under or by virtue of commissions directed to them for that purpose; and, when they commence acting under the powers so committed to them, they are said to open the commissions, and the day on which they so commence their proceedings is thence termed the commission day of the assizes.

OPENING A RULE. The act of restoring or recalling a rule, which has been made absolute, to its conditional state, as a rule *nisi*, so as to re-admit of cause being shewn against the rule. Thus, when a rule to shew cause has been made absolute under a mistaken impression that no counsel had been instructed to shew cause against it, it is usual for the party at whose instance the rule was obtained to consent to have the rule opened, by which all the proceedings subsequent to the day when cause ought to have been shewn against it are in effect nullified, and the rule is then argued in the ordinary way.

OPENING PLEADINGS. In trials at *Nisi Prius* it is the practice for the plaintiff's counsel to state briefly the substance and effect of the pleadings in the cause, in order that the jury may know what are the issues about to be tried, and this is termed "opening the pleadings."

OPTION. The archbishop has a customary prerogative when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by the bishop, in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors, and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose, which is, therefore, called his option. Cowel.

ORATOR. The plaintiff in a cause or matter in Chancery, when addressing or petitioning the Court, used to style himself "orator," and when a woman, "oratrix." But the phrase has long gone into disuse, and the customary phrases are now plaintiff and petitioner.

ORDEAL. The most ancient species of trial was that by ordeal, which was distinguished by the appellation of judi-

ORDEAL—*continued.*

cium Dei, and sometimes by *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. It was of two kinds: fire ordeal and water ordeal; the former being confined to persons of rank, the latter to the common people. Fire ordeal was performed either by taking up in the hand a piece of red-hot iron of one, two, or three pounds' weight, or else by walking barefoot and blindfold over nine red-hot ploughshares laid lengthwise, at unequal distances, and if the party escaped unburnt he was adjudged innocent; if otherwise, he was condemned as guilty. Water ordeal was performed either by plunging the bare arm up to the elbow in boiling water, or by casting the suspected person into a river or pond of cold water; and if in the former instance his arm was unburnt, or if in the latter instance he floated without any effort to swim, it was deemed evidence of his innocence; if otherwise, of his guilt. The ordeal was abolished in the reign of Henry III., when the more rational process of trying the guilt or innocence of an accused person by means of evidence laid before the jury was substituted for it.

See title JURY, TRIAL BY.

ORDERS OF THE DAY. Any member of the House of Commons who wishes to propose any question, or to "move the House," as it is termed, must, in order to give the House due notice of his intention, state the form or nature of his motion on a previous day, and have it entered in a book termed the order book; and the motions so entered, the House arranges, shall be considered on particular days, and such motions or matters, when the day arrives for their being considered, are then termed the "orders of the day." May on Parl.

ORDINANCE OF PARLIAMENT. Sir Edward Coke says that an ordinance of Parliament is to be distinguished from an Act of Parliament, inasmuch as the latter can be only made by the king and a threefold consent of the State, whereas the former may be ordained by one or two of them. At the time that the right of the Commons to participate in legislation was yet only in growth a distinction was taken, for the first time, in the reign of Edward III. between ordinances and statutes, the former being experimental Acts passed for a time only, and, as it were, on trial, and which might afterwards be, and often were, converted into statutes, i.e., permanent Acts, or else might be continued for a time, or discharged altogether.

ORDINARY. In the Civil Law signifies any judge who has authority to take cognizance of causes in his own right, and not by deputation. But in the Common Law it signifies the bishop of a diocese, though more frequently a commissary or official of the bishop or other ecclesiastical judge who has judicial authority within his jurisdiction.

ORDINARY OF NEWGATE. A divine who is appointed to attend the condemned criminals in that prison to prepare them for death, &c.

ORIGINAL WRIT. An original writ was the process formerly in use for the commencement of personal actions. It was a mandatory letter from the king, issuing out of Chancery, sealed with the great seal, and directed to the sheriff of the county wherein the injury was committed, or was supposed to have been committed, requiring him to command the wrongdoer or accused party either to do justice to the plaintiff, or else to appear in Court and answer the accusation against him. This writ is now disused, the writ of summons being the process prescribed by the Uniformity of Process Act for commencing personal actions; and under the Judicature Act, 1873, all suits, even in the Court of Chancery, are to be commenced by such writs of summons.

ORPHANAGE PART. That portion of an intestate's effects which his children are entitled to by the custom of London. This custom appears to be a remnant of what was once a general law all over England, namely, that a father should not by his will bequeath the entirety of his personal estate away from his family, but should leave them a third part at least, called the children's part, corresponding to the "bairns' part" or *legitim* of Scotch Law, and also (although not in amount) to the *legitima quarta* of Roman Law. Just. ii. 18.

OUSTED (from the Fr. *ouster*, to put out). To be removed or put out; thus, ouster of the freehold signifies being put out of possession of the freehold; ousted of an estate for years, signifies being turned out from the occupation of the land during the continuance of the term.

OUSTER LE MAIN (to remove the hand). When the male heir arrived at the age of twenty-one, or the heir female at the age of sixteen, they might sue out their livery of *ouster le main*; that is, the delivery of their lands out of their guardians' hands.

See also title LIVERY.

OUT OF COURT. He who has no legal

OUT OF COURT—*continued*.

status in Court is said to be "out of Court," *i.e.*, he is not before the Court. Thus, when the plaintiff in an action, by some act of omission or commission, shews that he is unable to maintain his action, he is frequently said to put himself "out of Court." Sometimes a person who is out of Court is said to have no *locus standi*.

OUTER BAR. Barristers at law are divided into two classes, *viz.* queen's counsel, who are admitted within the bar of the Courts, in seats specially reserved for themselves; and junior counsel, who sit without the bar; and the latter are thence frequently termed barristers of the "outer bar," or "utter bar," in contradistinction to the former class.

See also title **UTTER BARRISTERS**.

OUTLAWRY. The process of putting a man out of the protection of the law, so that he is incapable of bringing any action for redress of injuries; and it is also attended with a forfeiture of the party's goods and chattels, a consequence which is in no way affected by the Forfeiture for Felony and Treason Abolition Act, 1870 (33 & 34 Vict. c. 23).

OUTSTANDING TERMS: See title **TERM**.

OUVERTURE DES SUCCESSIONS. In French Law denotes the right of succession which arises to one upon the death, whether natural or civil, of another. Such successor must not be either as yet unconceived, or a child *non viable*, or one civilly dead; and he must also be clear of certain moral delinquencies, for which see Code Civil, 727. Bastards have no rights of succession; but in case their parent leaves legitimate offspring, they have one-third of the goods which, as a legitimate child, they would have received; and if the parent leaves no legitimate offspring, but ascendants or collaterals (being brothers or sisters), then one-half; and if the parent leaves neither legitimate offspring nor ascendants nor collaterals (being brothers or sisters), then three-fourths; and in case of a total failure of inheritable relations, then the whole. The widow surviving takes the succession where the parent leaves no inheritable relations or bastards, and failing her, the state.

OVERT (*Fr. open, &c.*) Thus an overt act signifies an open or manifest act, such as can be manifestly proved.

In charges of treason it is necessary in order to a conviction to substantiate either one overt act by at least two witnesses, or two overt acts of the same character by one witness *apiece*.

See title **TREASON**.

OYER (*to hear*). This word, says Dr. Cowel, seems formerly to have signified what our word *assize* does now, *sed quærr*, as to oyer of deeds, and oyer and terminer.

See the two following titles.

OYER OF DEEDS AND RECORDS.

Hearing of deeds and records. Thus, when either party in an action alleges any deed, he is in general obliged to make *profer* of such deed; that is, to produce it in Court simultaneously with the pleading in which it is alleged. When oral pleading was in practice, the deed was actually produced in Court; but afterwards *profer* consisted merely of a formal allegation that the party shewed the deed in Court, it being, in fact, retained in his own custody. When *profer* was thus made by one of the parties, the other, before he pleaded in answer, was entitled to demand oyer, that is, to hear it read; and this, either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents (not set forth by the adverse party), some matter of answer. Oyer of records was of the same nature, being a demand to hear any record read which had been alleged in the pleading of the opposite party. By the Common Law Procedure Act, 1852, s. 55, it shall not be necessary to make *profer* of any deed or other document mentioned or relied on in any pleading; and if *profer* shall be made, it shall not entitle the opposite party to crave oyer of, or set out upon oyer such deed or other document. But this provision affects the form of pleading only, and not also the rules of evidence, or the modes of proving any deed or other document.

OYER AND TERMINER (from the *Fr. ouir*, to hear, and *terminer*, to determine). A commission of oyer and terminer is a commission under the king's great seal, directed to certain persons, among whom two Common Law judges are usually appointed, empowering them to hear and determine treasons, felonies, robberies, murders, and criminal offences in general.

See title **JUSTICES OF OYER AND TERMINER**.

O, YES. It is said to be a corruption of the French *oyez*, *i.e.*, hear ye; and is sometimes used in Courts by the public crier, to command attention when a proclamation is going to be made.

P.

PAINE, FORT ET DURE (*Fr.*, punishment, strong and severe). A special punishment for those who, being arraigned

PAINE, FORT ET DURE—continued.

for felony, refused to put themselves upon the ordinary trial of God and the country, and were, therefore, considered as mute in the interpretation of the law. This punishment was vulgarly called pressing to death.

See also title **MUTE**.

PAIRING OFF. Members of the House of Commons cannot vote upon any question unless they are themselves present when the question is put. When, therefore, a member wishes to absent himself from the House, and at the same time is anxious not to diminish the strength of his party by the loss of his vote during his absence, he seeks out some member of the opposite party who is also anxious to absent himself, and by mutual agreement the two (or "pair" of) members arrange to be absent at the same time, the effect of which, of course, is, that on all questions which occur during their absence, a vote is neutralised on each side; and thus the relative numbers on any given division are precisely the same as if both members were present. This system is known by the name of "pairs," and members acting under this arrangement are thence said to "pair off" upon any question in which a division of the House takes place during their absence.

PAIS (Fr. country). A trial *per pais* signifies a trial by the country, or, as it is more commonly called, by jury. An assurance by matter *in pais* is an assurance transacted between two or more private persons *in pais* (in the country), i.e., upon the very spot to be transferred. Matter *in pais* seems to signify matter of fact, probably so called because matters of fact are triable by the country, i.e., estoppels *in pais* are estoppels by conduct, as distinguished from estoppels by deed or by record.

See title **ESTOPPELS**.

PALACES, ROYAL. The privilege of palace is attached to any place which is *de facto* the sovereign's residence. Hampton Court Palace was formerly a royal residence, but has not been personally occupied by the sovereign since 10 Geo. 2. The state departments have for many years past been used as a picture gallery, open, within certain hours, to the public gratuitously; the other apartments are occupied partly by officers of the palace, partly and chiefly by private persons, by the permission and at the pleasure of the Crown. The palace is under the control of a housekeeper of the Crown, who (the housekeeper) has apartments in the palace. A writ of *fi. fa.* having been executed in one of the suites of apartments occupied by private

PALACES, ROYAL—continued.

persons, an information of intrusion was filed against the sheriffs and their officers in a case of *Att.-Gen. v. Dakin and Others* (L. R. 2 Ex. 290). It was held, *per Curiam*, that actual personal residence of the sovereign at the time is not necessary to confer the privilege, if there is no intention to resume residence.

PANDECTS. The books of the Civil Law compiled by Justinian are so called. The word literally translated means a universal collection or compilation of passages, and denotes the universality of the subjects treated of in the *Corpus Juris Civilis*; whereas the word *Digest*, which in England is the more common of the two words, means a methodical arrangement, and denotes the method or order which is so perfectly observed in the arrangement of the same compilation.

PANEL. The slip of parchment on which the sheriff returns the name of the jurors to serve on a jury, is so called.

See also title **IMPANEL**.

PANIER. Is an attendant or domestic, who waits at table and gives bread (*panis*), wine, and other necessary things to those who are dining. The phrase was in familiar use amongst the Knights Templars, and from them has been handed down to the learned societies of the Inner and Middle Temples, who at the present day occupy the halls and buildings once belonging to that distinguished order, and who have retained a few of their customs and phrases. "From the time of Chaucer to the present day, the lawyers have dined together in the ancient hall, as the military monks did before them, and the rule of their order requiring two and two to eat together, and all the fragments to be given in brotherly charity to the domestics, is observed to this day, and has been so from time immemorial. The attendants at table, moreover, are still called 'paniers,' as in the days of the Knights Templars." Addison's *Knights Templars*.

PANNAGE, or PAWNAGE. Words used by our law writers to signify the money which the agistors of the forest collect for the feeding of swine within the forest, and sometimes it is used for the food itself. *Les Termes de la Ley*.

PARAMOUNT (from the French *par* and *monter*). The supreme lord of a fee, in contradistinction to the meane lord, who held of some superior under certain services (F. N. B. 135; Cowel). The sovereign is the universal lord paramount, of whom all lands are held in England.

See title **FEUDAL TENURES**.

PARAPHERNALIA (from the Greek *παρά, besides*, and *πέρη, dower*, i.e., something to which the wife is entitled over and above her dower). Under the term "paraphernalia" are included such apparel and ornaments of the wife as are suitable to her condition in life. Thus, pearls and jewels, usually or sometimes worn by the wife, although articles of mere ornament, have been held to fall within the term paraphernalia, as in the case of *Mangry v. Hungerford* (2 Eq. C. Ab. 156), where the widow claimed and obtained her gold watch and several gold rings as paraphernalia, which had been given to her at the funerals of relations.

PARAPHERNAUX, BIENS. In French Law all the wife's property which is not subject to the *régime dotal* (see that title) is called by this name; and of these the wife has the entire administration; but she may allow the husband to enjoy them, and in that case he is not liable to account. Compare English Law, **PIN-MONEY; SEPARATE ESTATE; PARAPHERNALIA**.

PARAVAIL (from the French *par* and *avayler*). Tenant paravail signified the lowest tenant of land, being the tenant of a mesne lord; he was so called because he was supposed to make avail or profit of the land for another. Cowell; 2 Bl. 60.

PARCENARY. The holding of lands jointly by parceners or coparceners. See title **COPARCENERS**.

PARCENERS: See title **COPARCENERS**.

PARDON. The Crown, in exercise of its prerogative of mercy, may pardon after conviction either of treason or of felony. But such pardon may not be given in anticipation of a conviction, and so as to be pleaded in defence to a prosecution (see title **DANBY, IMPEACHMENT OF**). The pardon relates of course only to the particular conviction for which it is given. *Reg. v. Harrod*, 2 C. & K. 294.

PARENT AND CHILD: See titles **INFANTS; SEDUCTION**.

PARK (*parcus*). The word commonly signifies an inclosure; but to constitute a legal park, or rather a park in the eye of the law, it must have been made so by the king's grant, or at least by immemorial prescription. *Les Termes de la Ley*.

See titles **CHASE; WARREN**.

PARLIAMENT—Its division into two Houses. The year assigned by Carte for this division is 17 Edward 3, and that is the most probable date. But Hallam argues for a much earlier date; and he instances 11 Edward 1 as a year in

PARLIAMENT—continued.

which the Houses were divided; the Commons and Spiritual Peers having in that year sat at Acton Burnell, while the Temporal Peers sat at Shrewsbury. It appears, however, that the separation in 11 Edward 1, was due to a special cause, that is to say, the temporal peers in their sitting at Shrewsbury were trying David Prince of Wales (otherwise called Llewellyn), on a charge of treason; and upon such a trial the Spiritual Peers, and *a fortiori* the Commons, were not entitled to be present. The other instances which Hallam puts forward might possibly be explained in like manner upon their special circumstances; and therefore any such occasional separations must not be suffered to impugn the authority of Carte, or the correctness of the date which he assigns. But, in fact, an earlier separation of Lords and Commons was not needed; for the Commons, even when they met under the same roof as the Lords always sat apart from the Lords in the lower end of the hall, and not then assuming to discharge any duties beyond the grant of money or supplies, there was no urgent reason in early times why they should sit in a separate house.

PARLIAMENTARY AGENTS. Persons who act as solicitors in promoting and carrying private bills through Parliament. They are usually attorneys or solicitors, but who do not usually confine their practice to this particular department.

PARLIAMENTARY TAXES. Such taxes as are imposed directly by Act of Parliament, i. e., by the Legislature itself, as distinguished from those which are imposed by private individuals or bodies under the authority of an Act of Parliament. Thus, a sewers rate, not being imposed directly by Act of Parliament, but by certain persons termed commissioners of sewers, is not a parliamentary tax; whereas the income tax, which is directly imposed, and the amount also fixed, by Act of Parliament, is a parliamentary tax.

See title **TAXATION**.

PAROL (Fr., signifying word, speech, &c.). This word signifies verbal, in contradiction to that which is written. Thus, a parol agreement signifies an agreement by word of mouth, in contradistinction to a written agreement. The pleadings in an action are also, in our old law French, denominated the parol, because they were formerly actual *verba* pleadings in Court, and not mere written allegations as at present. A remnant of this latter use of the word occurs in the phrase, "the parol shall not demur" (as to which, see

PAROL—*continued.*

next title). Parol evidence is also the phrase commonly used to denote extrinsic evidence, i. e., evidence outside of the written document which it is used to explain.

See title **EXTRINSIC EVIDENCE**.

PAROL DEMURRER. A plea to stop or stay the pleadings in an action. In many real actions brought by or against an infant under the age of twenty-one years, and also in actions of debt brought against him, as heir to any deceased ancestor, either party may suggest the non-age of the infant, and pray that the proceedings may be deferred till his full age or (in our legal phrase) that the infant may have his age, and that "the parol may demur," that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. This plea of parol demurrer was abolished by the stat. 11 Geo. 4 & 1 Will. 4, c. 47, as to proceedings under that statute, being chiefly decrees for the sale of real estate to pay debts. But since the Trustee Act, 1850, and Trustee Extension Act, 1852, a resort to the last-mentioned statute is seldom necessary.

PARSON (*persona*), in its legal acceptation, signifies the rector of a parochial church. He is called parson, *persona*, because, by his person, the church, which is an invisible body, is represented. Co. Litt. 300 a, s. 528.

PARSON IMPARSONEE. When a clerk is not only presented, but instituted and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson *impersonée*. Co. Litt. 300.

PARTAGE. This is, in French Law, the partition of English Law, and is demandable as of right.

PARTICULAR ESTATE. A limited legal interest or property in lands or tenements, as distinguished from the absolute property or fee simple therein, is usually so termed; and he who holds or enjoys such a limited interest therein is thence sometimes called the particular tenant. Thus, if A. has the absolute property or fee-simple in certain lands, and he demises them to B. for a term of seven years, or life, the legal interest which B. would thus acquire therein would be called the particular estate with reference to A.'s estate in fee-simple; i. e., it would be a particle or portion carved or cut out of A.'s fee-simple.

See also titles **REMAINDER**; **REVERSION**.

PARTICULARS OF DEMAND: See title **BILL OF PARTICULARS**.

PARTICULARS OF OBJECTIONS: See title **NOTICE OF OBJECTIONS**.

PARTIES, or PRIVIES. "Parties" to a deed or contract are those with whom the deed or contract is actually made or entered into. By the term "privies," as applied to contracts, is frequently meant those between whom the contract is mutually binding, although both are not literally parties to such contract. Thus, in the case of a lease, the lessor and lessee are both parties and privies, the contract being literally made between the two, and also being mutually binding; but if the lessee assign his interest to a third party, then a privity arises between the assignee and the original lessor, although such assignee is not literally a party to the original lease.

See also title **PRIVIES**.

PARTITION (*partitio*). The dividing of lands held by joint tenants, coparceners, or tenants in common, into distinct portions, so that they may hold them in severalty; and the instrument by which this partition or division is effected is called a deed of partition (4 Cruise, 83). A partition is usually effected upon bill filed in the Court of Chancery, after the decree on which the parties execute to each other the requisite mutual conveyances of each other's shares (see title **CONVEYANCES**). But if the parties can agree among themselves to make a partition, there is no occasion to resort to the Court at all. Since the Partition Act, 1868 (31 & 32 Vict. c. 40), the Court may in certain cases specified in the Act decree a sale in lieu of partition.

PARTNERSHIP. This is a voluntary contract, whereby two or more persons agree to put their money and labour, or either, together in some lawful business, and to divide the profits arising from the business. No third party can be introduced into the partnership without the consent of all; but he may be taken as a sub-partner of one or more of the partners (*Ex parte Barrow*, 2 Rose 255). Upon the death of a partner, he may not by his will introduce a successor to his share (*Pearce v. Chamberlain*, 2 Ves. 33), unless the partnership agreement authorizes him to do so. *Stuart v. Bute* (*Earl*), 3 Ves. 212; 11 Ves. 657.

In the absence of stipulation, the shares of the partners, both in the capital and in the profits, are presumed to be equal, and the losses to be similarly divisible (*Peacock v. Peacock*, 16 Ves. 49); but the presumption is rebuttable (*Stewart v. Forbes*, 1 Mac-

PARTNERSHIP—continued.

& G. 137). A partner is not entitled to interest on the capital which he brings in (*Hill v. King*, 1 N. R. (L.C.) 161), but he is entitled to interest on advances made in excess of his share of capital (*Ex parte Chippendale*, 4 De G. M. & G. 36), five per cent. being the customary rate. *Ex parte Bignold*, 22 Beav. 167.

The true criterion of a partnership is, that each member of it stands in the relation of a principal to the other members, who in that regard are his agents (*Cox v. Hickman*, 8 H. C. 268); consequently a person may share profits without being a partner, as well by the Common Law, as under the Act 28 & 29 Vict. c. 86, and may in that manner escape all liability for losses. On the other hand, a person who is not a partner may by holding himself out as one, become liable for losses, although not entitled to share in profits (*Ex parte Watson*, 19 Ves. 461); but merely continuing the name of a deceased partner in the style, does not charge the executor with liability on contracts made since the death of his testator by the surviving partners. *Deaynes v. Noble (Houlton's Case)*, 1 Mer. 616.

The liability of a partner extends to all acts of his co-partners reasonably within the scope of the partnership business, (*Sandiland v. Marsh*, 2 B. & Ald. 672) although beyond the agreed powers of the co-partners, (*Hawken v. Bourne*, 8 M. & W. 710); and such liability commences with the *de facto* commencement of the partnership, notwithstanding the partnership articles may not be signed till afterwards (*Battley v. Lewis*, 1 Man. & G. 155), but it does not commence sooner as to third parties, notwithstanding by special agreement it commences sooner as between the co-partners (*Vere v. Ashby*, 10 B. & C. 288). However, no contract of one or more partners will bind the other or others if it be in a matter wholly unconnected with the partnership (*Ex parte Agace*, 2 Cox, 312); and no partner can bind the partnership by executing a deed (*Harrison v. Jackson*, 7 T. R. 207), unless he have been authorized by deed to execute it (*Horsley v. Rush*, 7 T. R. 209), or, unless the deed be one of release as distinguished from one of grant (*Aspinall v. London and North-Western Ry. Co.*, 11 Hare, 325), the transaction being, of course, one within the scope of the partnership (*Ex parte Bosanquet*, 1 De G. 432). Also, ordinarily, one partner cannot bind the firm by a guarantee for collateral purposes (*Brettell v. Williams*, 4 Ex. 623), unless the other partners are proved to have sanctioned it (*Sandilands v. Marsh*, 2 B. & Ald. 672); also, one partner's part payment of the principal or

PARTNERSHIP—continued.

interest of a debt does not save the Statute of Limitations, as against the other partners, M. L. A. Act, 1856 (19 & 20 Vict. c. 97), s. 14, altering the former law (*Whitcomb v. Whiting*, Doug. 651); also, one partner cannot bind the firm by a submission to arbitration (*Stead v. Salt*, 10 Moo. 389). Neither can a partner in a non-mercantile firm ordinarily draw or accept bills or notes, or give a receipt for money so as to bind the firm (*Harman v. Johnson*, 2 Fl. & Bl. 61; *Dickinson v. Valpy*, 10 B. & C. 128); and a partner in a mercantile firm even cannot borrow money for the purpose of increasing the fixed capital of the firm. *Fisher v. Tayler*, 2 Hare, 218.

And with reference to the duration of the liability of partners, the liability of a retiring or deceased partner ceases with the cessation of the partnership as to him, provided notice by circular letter and in the *Gazette* has been given (*Kirwan v. Kirwan*, 2 C. & M. 617; *Newsome v. Coles*, 2 Camp. 617), but only as to contracts subsequent to the date of his interest ceasing (*Wood v. Braddick*, 1 Taunt. 104; *Pinder v. Wilks*, 5 Taunt. 612); a dormant partner does not require to give such notice, excepting to the customers who knew his connection with the firm (*Evans v. Drummond*, 4 Esp. 89). And it is competent for the creditors (although not also for the continuing partners, unless with the consent of the creditors) to accept the liability of the continuing partner and to discharge the ceasing partner. *Lyth v. Ault*, 7 Ex. 669, overruling *Lodge v. Dica*, 3 B. & Ald. 611.

Partnerships are usually carried on under agreements in writing (whether under hand and seal or under hand only), but a mere parol agreement suffices, and may even be substituted at any time for the written one (*England v. Curling*, 8 Beav. 129); and where a partnership is continued after the term specified in the writing, it is a partnership at will upon the old footing, so far as applicable (*Clark v. Leach*, 1 De G. J. & S. 490); and the same is the case when a new partner is taken in without any fresh writing. *Austen v. Boys*, 24 Beav. 598.

One partner cannot sue another at Law in respect of a partnership matter, and therefore can have no account there (*Bovill v. Hammond*, 6 B. & C. 149), unless upon a special covenant for breach thereof (*Brown v. Tapscott*, 6 M. & W. 119), or for a balance of account upon an implied promise to pay (*Wray v. Milestone*, 5 M. & W. 21). But even at Law one partner may sue another for a matter *dehors* the partnership (*French v. Styling*, 2 C. B. (N.S.) 357), for example, for money ad-

PARTNERSHIP—continued.

vanced or work done before the partnership, although towards the formation of the partnership (*Venning v. Leekie*, 13 East, 7). But in Equity the partner has the following remedies against his co-partner:—

I. Specific performance,—

- (a.) Of contract for partnership for a term of years, when there have been acts of part performance (*Scott v. Rayment*, L. R. 7 Eq. 112); but not
- (b.) Of agreement for reference (*Street v. Rigby*, 6 Ves. 818).

II. Injunction,—

- (a.) Against wilfully excluding a co-partner's name from the style, contrary to agreement (*Marshall v. Colman*, 2 Jac. & W. 266);
- (b.) Against one partner engaging in another business, contrary to agreement (*Somerville v. Mackay*, 16 Ves. 882);
- (c.) Against wilfully excluding a co-partner from the exercise of his rights as such (*Dietrichsen v. Cabburn*, 2 Ph. 59);
- (d.) Against a sudden dissolution working irreparable damage. 1 Lindl. Partnership, 232, 3rd ed.

III. Decree for dissolution, including the taking of the accounts and the appointment of a receiver, with a view to the dissolution;

- (a.) Where the co-partnership originated in fraud (*Raulins v. Wickham*, 1 Giff. 355);
- (b.) Where a co-partner is guilty of gross misconduct in partnership matters (*Smith v. Jeyes*, 4 Beav. 503);
- (c.) Where a co-partner is continually breaking the partnership agreement (*Waters v. Taylor*, 2 V. & B. 299);
- (d.) Where the incompatibility of tempers is extreme (*Baxter v. West*, 1 Dr. & Sm. 173);
- (e.) Where a co-partner whose personal skill was indispensable to the partnership becomes insane. *Jones v. Noy*, 2 My. & K. 125.

IV. Receiver,—towards dissolution. Hall v. Hall, 3 Mac. & G. 79.**V. Accounts,—without dissolution;**

- (a.) Where a partner has been excluded;
- (b.) Where the partner complaining would be entitled to ask for a dissolution. *Fairthorne v. Weston*, 3 Hare, 387.

VI. Discovery,—in aid of an action at law, and even of a compulsory**PARTNERSHIP—continued.**

reference to arbitration (*British E. I. Co. v. Somes*, 5 W. R. 813).

Moreover, the jurisdiction in Equity is, in general, much more available, and also more advantageous than that at Law, as will be seen from the following instances:—

- (1.) Upon the decease of a co-partner the creditors can only proceed against the survivors, but in Equity they may proceed against the estate of the deceased (*Vulliamy v. Noble*, 3 Mer. 593);
- (2.) In the case of two firms having a common partner, neither firm can sue the other at Law, (*Bosanquet v. Wray*, 6 Taunt. 597), but in Equity each may sue the other (*Mainwaring v. Newman*, 2 B. & P. 120);
- (3.) In the case of a co-partner purchasing a share in the partnership, he cannot at Law sue his co-partners to recover it, but in Equity he may (*Wright v. Hunter*, 5 Ves. 792);
- (4.) The lands of a co-partnership are at Law liable only as lands, but in Equity they are liable as personal estate (*Baring v. Noble*, 2 Ry. & M. 495); and
- (5.) Generally, a co-partner cannot obtain either specific performance, an injunction, a decree for dissolution, the appointment of a receiver, or an order to account at Law, although he may (as above is mentioned) have all of these in Equity.

A partnership depending for its commencement upon the consent of the partners, depends upon the same consent for its continuance; and therefore the dissolution of a partnership may be brought about by any sufficient dissent of the partners to its continuance,—namely, in the following variety of ways:—

I. Dissolution by act of the partners themselves,—

- (1.) Consent of all to dissolve (*Hall v. Hall*, 12 Beav. 414);
- (2.) Dissent of one, where partnership is at will (*Master v. Kirton*, 3 Ves. 74; *Chavany v. Van Sommer*, 3 Wood. Lect. 416, n.);
- (3.) Efflux of term of co-partnership. *Featherstonhaugh v. Fenwick*, 17 Ves. 278.

II. Dissolution by operation of law,—

- (1.) By conviction of a partner for felony;
- (2.) By the marriage of a partner, being a female (*Nerot v. Burmand*, 4 Russ. 247);

PARTNERSHIP—continued.

- (3.) By one partner's general assignment (*Heath v. Sanson*, 4 B. & Ad. 172);
- (4.) By execution creditor of a partner seizing his share or part thereof (*Fox v. Hanbury*, Cowp. 445);
- (5.) By bankruptcy of a partner (*Crawshay v. Collins*, 15 Ves. 218), the dissolution taking effect upon adjudication, but dating backwards to act of bankruptcy (*Dutton v. Morrison*, 17 Ves. 193);
- (6.) By hostilities between two countries of co-partners, where they are foreigners to each other (*Griswold v. Waddington*, 16 Johns. (Am.) 438);
- (7.) By death of a partner (*Gillespie v. Hamilton*, 3 Madd. 254);

III. Dissolution by decree of Court of Equity, for the reasons enumerated above.

Immediately upon a dissolution being made, the power of the partners, either together or individually, to enter into any new engagements ceases (*Ex parte Williams*, 11 Ves. 5); nevertheless each partner may actively assist in the winding-up of the business, and therefore may give a valid receipt for any debt of the partnership received by him (*Fox v. Hanbury*, Cowp. 445), and may even compound debts provided the composition be fair and honourable (*Beak v. Beak*, Ca. t. Finch, 190). And in case of a dissolution by death or bankruptcy, the surviving or solvent partners cannot insist upon taking the partnership effects at a valuation (*Cook v. Collingridge*, Jac. 607), but all the property of the firm as well real as personal must be sold (*Crawshay v. Maule*, 1 Sw. 495), although at the sale the partners may bid (*Chambers v. Howell*, 11 Beav. 6), having first obtained the leave of the Court, where the sale is by direction of the Court. (*Rowland v. Evans*, 30 Beav. 302).

The creditors of the partnership, not being execution creditors, have no direct lien on the partnership effects, but have an indirect lien through the direct lien of the partners themselves thereon (*Ex parte Ruffin*, 6 Ves. 119); consequently the partnership (or, as they are called, joint) creditors have the first claim on the partnership (i.e., joint) property for the payment of their debts, the partners themselves having that right, in exoneration *pro tem.* or *pro tanto* of their respective private (i.e., separate) estates, and on the other hand the separate creditors of each partner have the first claim on the separate estate of that partner; then, if the partnership is solvent and the individual partners also solvent,

PARTNERSHIP—continued.

there is an end of the rights of creditors, their debts being paid. But if, on the one hand, the partnership is insolvent, the joint creditors may thereafter come down on the respective separate estates of the individual partners whether living or dead; and if, on the other hand, any one or more of the individual partners are insolvent, his or their respective separate creditors may thereafter come down upon the partnership estate to the extent of his or their respective shares therein; and it makes no difference whether the estate is administered out of Court or in Court, and if in Court whether in a Court of Equity or in a Court of Bankruptcy (*Ridgway v. Clare*, 19 Beav. 111). But although the order above described is the natural order of payment, yet any joint creditor may in the absence of a bankruptcy proceed in the first instance against the separate estate, and any separate creditor against the joint estate, occasioning a certain amount of disorder thereby, which disorder, however, is afterwards removed in the general settlement of the accounts (*Wilkinson v. Henderson*, 1 My. & K. 582), the principle of settlement being the principle of marshalling derived from the natural order of payment mentioned above, and the whole doctrine resting upon the principle of Equity, that every partnership debt is not only a joint but also a several debt (*Burn v. Burn*, 3 Ves. 573), unless it be the result of some arbitrary joint convention of the partners. (*Sumner v. Powell*, 2 Mer. 30).

By the Bankruptcy Act, 1869, s. 37, if any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are in whole or part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts; and by the Rules in Bankruptcy made in pursuance of the Bankruptcy Act, 1869, G. R. 76, any separate creditor of any bankrupt is at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons; and under every such adjudication distinct accounts are to be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate is to be applied in the first place in the satisfaction of the debts of the separate creditors; and in case there is an overplus of the separate estate, such overplus is to be carried to the account of the joint estate. And in case

PARTNERSHIP—continued.

there is an overplus of the joint estate, such overplus is to be carried to the accounts of the separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate. So that the principles of the Common Law as evolved from the decisions have been followed *simpliciter* in the provisions of the Bankruptcy Act, 1869.

But where a retiring partner, upon the dissolution of a partnership, assigns all his interest in the partnership property to the remaining partner, and the assignment is *bona fide*, that assignment converts the joint property of the partnership into the separate property of the remaining partner, so as that so much of the then partnership property as remains in specie upon the subsequent bankruptcy of the surviving partner vests in the trustee in bankruptcy of the latter as his separate estate, and is liable accordingly (*Ex parte Ruffin*, 6 Ves. 119). But the assignment must be complete (*Ex parte Williams*, 11 Ves. 3), for if anything remains still to be done to render it complete, the conversion of joint into separate property does not take effect (*Ex parte Wheeler*, Buck. 25); moreover, the property must not be suffered to remain in the order and disposition of the old partnership (*Ex parte Burton*, 1 Glyn & J. 207). The effect of the conversion is of course to give the separate creditors a prior claim upon the property (*Ex parte Freeman*, Buck. 473); it does not deprive the joint creditors of their right to be paid somehow (*Ex parte Peake*, 1 Madd. 358). Moreover, the assignment requiring to be *bona fide*, the insolvency of the partners, either collectively or individually, at the date of the assignment would render it fraudulent (*Ex parte Mayen*, *In re Edwards, Woods & Greenwood*, 34 L. J. (Bkcy.) 25), unless the *bona fides* of it is otherwise proved. *Ex parte Peake*, *In re Lightoller*, 1 Madd. 346.

PARTY AND PARTY, BETWEEN. This phrase signifies between the contending parties in an action, *i.e.*, the plaintiff and defendant, as distinguished from the attorney and his client. These phrases are commonly used in connection with the subject of costs; and in order to give a precise idea of their scope and meaning, it will be necessary to consider briefly the nature of costs. Such of these charges and expenses as are necessarily incurred in the prosecuting and defending the action, and which arise as it were out of the proceedings themselves, are denominated costs in the cause, the payment of which usually devolves upon the defeated or unsuccessful party. In addition to these, there are others which, though not arising directly

PARTY AND PARTY, BETWEEN—cont.

out of the proceedings themselves, are usually paid by each party to his own attorney, whatever may have been the result of the cause, and these are commonly called costs as between attorney and client, as distinguished from the costs in the cause, or, as the latter are sometimes called, costs as between party and party.

The scale upon which costs as between solicitor and client are calculated is more liberal than that upon which costs as between party and party are calculated; and the Court in a proper case will direct all the costs of a proceeding to be paid out of the estate as between solicitor and client, but more often the direction for payment is as between party and party only. See *Morgan and Davey on Costs*.

PARTY-WALL. Is a partition wall; *i.e.*, a wall dividing two messuages. Peculiar provisions exist under statute regarding party walls within the metropolis. See title *METROPOLITAN BUILDINGS* and statutes there cited.

PASS, TO. To go, to be transferred, to be conveyed, *e.g.*, by a conveyance of a house do the fixtures pass? *i.e.*, do they go, or are they conveyed as part and parcel of the house? Again, does the fee pass under the word "estate?" *i.e.*, does the fee simple in land become transferred or pass away under the term "estate?"

PASSING ACCOUNTS. When an auditor appointed to examine into any accounts certifies to their correctness, he is said to "pass" them; *i.e.*, they pass through the examination without being detained or sent back for inaccuracy or imperfection.

PASSING RECORD. When the proceedings are entered upon the *nisi prius* record, it used to be taken to the master's office and there examined by the proper officer, who then signed it; and the record was then said to be "passed." But by the C. L. P. Act, 1852, s. 102, the record of *nisi prius* shall not be sealed or passed, but may be delivered to the proper officer of the Court in which the cause is to be tried, to be by him entered as at present and remain until disposed of.

See title *ENTRY FOR TRIAL*.

PATENT AMBIGUITY. This is an ambiguity which arises upon the words of the will, deed, or other instrument, as looked at in themselves, and before they are attempted to be applied to the object or to the subject which they describe. The term is opposed to the phrase *Latent Ambiguity* (which title see). The rule of law is, that extrinsic or parol evidence,

PATENT AMBIGUITY—*continued.*

although admissible in all cases to remove a latent ambiguity, is admissible in no case to remove a patent one.

See title **EXTRINSIC EVIDENCE**.

PATENTS. In consequence of the abuse of the prerogative in granting *monopolies* (see that title), the statute 21 Jac. 1, c. 3, was passed, which, after declaring that the letters patent theretofore granted were contrary to the laws of this realm, and therefore utterly void and of none effect, went on to provide and enact that any declaration in the Act before mentioned should not extend to any letters patent for the term of *one and twenty years* or under theretofore made, or thereafter to be made, of the sole working or making of any manner of new manufacture within this realm to the first and true inventor or inventors of such manufactures, which others at the time of the granting of such letters patent did not use, so they be not contrary to the law nor mischievous to the state by raising of the prices of commodities at home, or hurt of trade, or generally inconvenient. Upon this statute the whole patent law is to the present day substantially founded; but it is competent upon petition to the Crown to obtain an extension of this patent right after the expiration of the fourteen years allowed by the statute of James for such further period as the Privy Council shall think is fit or proper for the due remuneration of the inventor. This extension is permitted under the statutes 5 & 6 Will. 4, c. 83, and the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83).

See also titles **NOTICE OF OBJECTIONS**; and **SPECIFICATION**.

PATRON (*patronus*). He who has the right, title, power, or privilege of presenting to an ecclesiastical benefice.

See title **ADVOWSON**.

PAUPERIS FORMÂ: See title **FORMÂ PAUPERIS**.

PAWNBROKERS. Are a species of paid bailees, and their liabilities in respect of negligence are determined accordingly (see title **NEGLIGENCE**). If left to the Common Law, the rights of pawnbrokers would be the rights of ordinary pawnees or pledgees (see title **PLEDGE**); but owing to certain abuses to which the trade of pawnbroking is exposed, the Legislature has thought fit to control it by statutory provision. The Acts upon the subject in force until recently were the 39 & 40 Geo. 3, c. 99, and 23 & 24 Vict. c. 21; but both these statutes, together with many minor ones, have been repealed, and the whole law of pawnbrokers consolidated

PAWNBROKERS—*continued.*

and amended by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). That Act divides loans into two classes:—

(1.) Loans above 10s. and not above 40s., on which class of loans a charge of one penny is allowed for the ticket, and one halfpenny per two shillings per calendar month by way of profit, all fractions of two shillings or calendar months (unless under a fortnight) being chargeable at the same rate; and

(2.) Loans above 40s. and not above £10, on which class of loans a charge of one penny is allowed for the ticket, and one halfpenny per half-crown per calendar month by way of profit, all fractions of half-crowns or calendar months being chargeable at the same rate.

The statute (s. 16) directs that every pledge shall be redeemable within twelve months from the day of pawning, exclusive of that day, with seven days of grace. And by s. 17, a pledge pawned for 10s. or under, if not redeemed within that time becomes the absolute property of the pawnbroker; but by s. 18, a pledge for above 10s. continues redeemable beyond that time until the actual sale thereof. The sale shall be only by public auction (s. 19), and the pawnbroker is to account for the surplus (if any), allowing for costs of sale and any set-off. The Act does not prohibit special contracts between the pawnbroker and his customer (s. 24). Upon production of the ticket and payment of all sums owing on the pledge within the period for redemption, the pawnbroker is bound to deliver up the same; and by s. 27, he is made liable for all damage or destruction occasioned by fire. Section 29 makes provisions for cases in which the ticket has been lost.

By the Common Law (*Morley v. Attenborough*, 3 Ex. 500), a pawnbroker could not retain goods illegally pawned, *e.g.*, stolen goods, nor could the purchaser from him retain same, as against the true owner; but under s. 30 of the Act of 1872, upon conviction of the thief, the Court may (in its discretion) either allow the pawnbroker to retain the goods as a security for the money advanced or order the restitution thereof to the true owner.

PAYMENT. This is the normal mode of discharging any obligation. In the case of several distinct debts owing between the same creditor and debtor, if the debtor makes a general payment, the doctrine of the **APPROPRIATION OF PAYMENTS** is called into activity (see that title).

PAYMENT OF MONEY INTO COURT. When the defendant, in an action brought for a given sum, admits either the whole

PAYMENT OF MONEY INTO COURT—*continued.*

or a part of the plaintiff's claim, he often, with the view of preventing the plaintiff from further maintaining his action, pleads what is termed a "plea of payment into Court," by which he alleges that he brings a sum of money into Court ready to be paid to the plaintiff if he will accept the same, and that the plaintiff has no claim to a larger amount; and this plea is accompanied by an actual payment of the specified sum into the hands of the proper officer of the Court, where the plaintiff, or usually his attorney, may, upon application, obtain it. Should the plaintiff, after this, proceed with the action, he does so at the peril of being defeated, and having the costs to pay, unless he should, upon the trial, prove that a further sum still remains due to him from the defendant. By the C. L. P. Act, 1852 (15 & 16 Vict. c. 76), s. 70, in extension of a similar provision contained in the 3 & 4 Will. 4, c. 42, s. 21, it is lawful for the defendant in all actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution [criminal conversation], or debauching of the plaintiff's daughter or servant), and, by leave of the Court or a judge, upon such terms as to the latter shall seem fit, for one or more of several defendants, to pay into Court a sum of money by way of compensation or amends. Such payment into Court admits the plaintiff's ground of action, and the plaintiff is entitled to have the money in any event; but, *semble*, the Court may control or direct the application of the money. *Carr v. Royal Exchange Insurance Company*, 34 L. J. (Q. B.) 31.

PEACE, ARTICLES OF THE. Where a person says that his life is endangered through the hostility of some one, he may exhibit articles of the peace (being a formal statement of the danger) to the Court or a magistrate, who will thereupon require the party informed against to give security to keep the peace. But the Court must satisfy itself that there is on the face of the articles a reasonable ground of fear. The articles are put in upon oath, and the defendant cannot controvert the allegations contained therein, even by affidavit. *Rez v. Doherty*, 13 East, 171.

PEACE OF GOD AND THE CHURCH. Anciently meant to signify that rest and cessation which the king's subjects had from trouble and suit of law between the terms. Cowel.

PECULIAR. This was the phrase used to designate a particular parish or church that had jurisdiction within itself for

PECULIAR—continued.

granting probates of wills, &c., exempt from the Ordinary or Bishop's Courts. The *Court of Peculiars* was a Court annexed to the Court of Archbishops, and had jurisdiction over all those parishes dispersed through the province of Canterbury, in the midst of other dioceses, which were exempt from the ordinary jurisdiction and subject to the metropolitan only, in which Court all ecclesiastical causes arising within these peculiar or exempt jurisdictions were originally cognizable. *Les Termes de la Ley*.

PECUNIARY CAUSES. These were causes arising either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church whereby some damage accrued to the plaintiff; towards obtaining satisfaction for which he was permitted to institute a suit in the Spiritual Court. Such, for instance, were the subtraction and withholding of tithes from the parson or vicar; the non-payment of ecclesiastical dues to the clergy, as pensions, mortuaries, compositions, and the like.

PEERS. Those who are impanelled in an inquest upon any man for the convicting or clearing him of any offence for which he is called in question. The jury was so called from the Latin *pares*, i.e., equals, because it is the custom of this country to try every man by his equals, that is to say, by his peers (*judicio parium suorum*). The word "peer" seems also not merely to have signified one of the same rank; but it was also used to signify the vassals or tenants of the same lord, who attended him in his Courts and adjudicated upon matters arising out of their lord's fees, and were thence called peers of fees (Cowel; *Les Termes de la Ley*). Whence also apparently the king's barons, who sit in the House of Lords, are called his *peers*, being (or having at any rate been) to some extent and for some purposes the equals of the sovereign.

See also titles **BARONY**; and **LORDS**, **HOUSE OF**; and next title.

PEERS, QUALITY OF SPIRITUAL. For the general nature of *Barony*, in the case of the Temporal Peers or Lay Lords, as they may be called, *see* title **BARONY**. With reference to the *Spiritual Peers*, or Bishops, as they now are, their title of peerage seems to rest upon the following bases or basis:—

In early times the title of the prelates to sit in the House of Peers was cumulative, resting on one or more of the following grounds:—

- (1.) Their learning,
- (2.) The custom of Western Europe (in-

PEERS, QUALITY OF SPIRITUAL — continued.

clusive of England) to admit the clergy to their supreme councils; and

(3.) The tenure of lands by barony.

Probably, however, the third of these three grounds was the chiefest, as the absence of it is in some instances (*e.g.*, that of the Prior of St. James, at Northampton, in 12 Edw. 2, and that of the Abbot of Leicester in 25 Edw. 3) made a ground of exemption to the prelate from attendance in Parliament; it is certain, however, that the third ground was not a *sine quâ non* in the Spiritual Peerage, as many spiritual peers were in the House upon the grounds of their learning and of the custom of Europe alone, or upon one of such grounds; and that, or those, are the present titles of the spiritual peers to sit in the House of Lords.

To all intents and purposes the spiritual peers were (with one exception) upon a level with the temporal peers for the time being, but they must necessarily have been (in most if not all cases) life peers only. The one exception to this general equality consisted in the following peculiarity, namely, the spiritual had not (nor have they) the right of being present during the trial or (at any rate) upon the judgment (whether of condemnation or of acquittal) of a temporal peer, or of being themselves tried (like a temporal peer) by their peers. This point of inferiority, however, has never been assented to by the spiritual peers themselves; *e.g.*, in 25 Edw. 3, upon the trial of a certain temporal peer, the spiritual peers, upon retiring, remonstrated that they had full right to remain; and again, *e.g.*, in 1357, the Bishop of Ely claimed to be tried by the Lords, but that claim was disallowed, and he went before a jury; and the same was the case with Bishop Fisher in the reign of Henry VIII., which latter case settled the law.

PENAL BILL. An instrument formerly in use by which a party bound himself to pay a certain sum or sums of money, or to do certain acts, or in default thereof to pay a certain specified sum by way of penalty, thence termed a penal sum. These instruments have been superseded by bonds in a penal sum, with conditions.

PENAL STATUTES. Statutes imposing certain penalties on the commission of certain offences; and actions brought for the recovery of such penalties are denominated penal actions. Inasmuch as a penal statute is, to the extent of the penalty, a money-bill, the Commons claim the exclusive right as to all such enactments,

PENAL STATUTES—continued.

the Lords and Crown having merely an assenting vote.

See title **MONEY-BILLS**.

PENALTY OF A BOND. The sum of money which the obligor of a bond undertakes to pay by way of penalty, in the event of his omitting to perform or carry out the terms imposed upon him by the conditions of the bond. The distinction between a penalty and a sum payable as liquidated damages is this, that the penal sum is generally or always double the amount of the debt secured by the bond, whereas liquidated or ascertained damages, as the name indicates, are intended to denote, and usually denote, the exact amount of the debt. The Courts of Law and also of Equity relieve against penalties upon payment of the principal debt, and interest, and costs; nor will this right to relief be excluded by the parties merely designating that as liquidated damages which is in reality a penalty (*Kemble v. Farren*, 6 Bing. 141), unless where the damages are altogether unascertainable, otherwise than by the amount fixed by the instrument. *Atkins v. Kinnier*, 1 Ex. 659.

PENDENTE LITE. Pending the suit, whilst the suit is pending.

See also title **LIS PENDENS**.

PENSION (*pensio*). That which in the Inner and the Middle Temple is called a parliament, and in Lincoln's Inn a council, is in Gray's Inn termed a pension; that is, an assembly of the members of the society to consult of their affairs. Certain annual payments of each member of the Inns of Court are also so termed. There is also a writ called a pension writ, which seems to be a sort of peremptory order against those members of the society who are in arrear with their pensions and other dues. Cowel.

See also titles **CIVIL LIST**; **PENSION LIST**.

PENSION LIST. This is the list of persons receiving pensions from the royal bounty. As to the limits of such bounty, see title **CIVIL LIST**.

PEPPERCORN RENT. Where only a nominal rent is wished to be reserved, the reservation is frequently confined to "one peppercorn."

PER AUTRE VIE. For or during the life of another, for such a period as another person shall live.

See title **PUR AUTRE VIE**.

PER CUI ET POST.—Writ of Entry.

See title **ENTRY**, **WARRANT**.

PER CURIAM (*By the Court*). A figurative phrase commonly used in the reports, and meaning that the presiding judge or judges spoke to this or that effect.

PER, IN THE: See title ENTRY, WRIT OF.

PER MY ET PER TOUT (*by the half and by all*). This phrase is applied to joint tenants who are said to be seised *per my et per tout*; that is, by the half or moiety and by all; that is, they each have the entire possession as well of every parcel or piece of the land as of the whole considered in the aggregate. For one of them has not a seisin of one-half or moiety, and the other of the other half or moiety; nor can one be exclusively seised of one acre and his companion of another, but each has an undivided half or moiety of the whole, and not the whole of an undivided moiety.

PERAMBULATIONE FACIENDA. A writ which lies where two lordships lie near each other, and some encroachments are supposed to have been made, by which writ the parties consent to have their bounds severally known. It is directed to the sheriff, commanding him to make perambulation and to set down their certain limits. F. N. B. 133.

PER TOTAM CURIAM is a similar expression, meaning that the whole Court, i.e., all the presiding judges, were unanimous in the judgment, dictum, or expression of opinion; e.g., "and it was resolved *per totam Curiam* that it could not be attached."

PEREMPTORY. In Law this word signifies absolute, final, determinate, &c. The meaning of the word in its different applications may be collected from perusing the following titles:—

PEREMPTORY CHALLENGE. Is a privilege allowed to a prisoner in criminal cases, or at least in capital ones, *in favorem vite*, to challenge a certain number of jurors, without shewing any cause for so doing.

See title CHALLENGE.

PEREMPTORY MANDAMUS. When a mandamus has issued commanding a party either to do a certain thing or to signify some reason to the contrary, and the party to whom such writ is directed returns or signifies an insufficient reason, then there issues in the second place another mandamus, termed a peremptory mandamus, commanding the party to do the thing absolutely, and to which no other return will be admitted but a certificate of

PEREMPTORY MANDAMUS—contd.

perfect obedience and due execution of the writs.

See also title MANDAMUS.

PEREMPTORY PAPER. A list of the causes which are enlarged at the request of the parties, or which stand over from press of business in Court.

PEREMPTORY PLEAS. Pleas in bar are so termed in contradistinction to that class of pleas called dilatory pleas. The former, viz., peremptory pleas, are usually pleaded to the merits of the action with the view of raising a material issue between the parties; whilst the latter class, viz., dilatory pleas, are generally pleaded with the view of retarding the plaintiff's proceedings, and not for the purpose of raising an issue upon which the parties may go to trial and settle the point in dispute. Peremptory pleas are also called *pleas in bar*, while dilatory pleas are said to be *in abatement* only.

See title ABATEMENT, PLEAS IN.

PEREMPTORY RULE TO DECLARE. When the plaintiff in an action was not ready to declare within the time limited, and the defendant wished to compel the plaintiff to declare, he procured what was termed a peremptory rule to declare, which was in the nature of an order from the Court, compelling the plaintiff to declare peremptorily under pain of judgment of *non pros*, being signed against him. But by the O. L. P. Act, 1852, s. 53, rules to declare, or declare peremptorily, shall not be necessary, but instead thereof a notice shall be given requiring the opposite party to declare, otherwise judgment. If the plaintiff is not prepared to declare within the four days, he may obtain from the judge an extension of time upon sufficient grounds.

PEREMPTORY WRIT. This was an original writ called a *si te fecerit securum*, from the words of the writ; which directed the sheriff to cause the defendant to appear in Court without any option given him, provided the plaintiff gave the sheriff security effectually to prosecute his claim; this writ was in use where nothing was specifically demanded, but only a satisfaction in general; as in the case of writs of trespass on the case, wherein no debt or other specific thing is sued for, but only damages to be assessed by a jury. 1 Arch. Pract. 205.

PERFECTING BAIL. Certain qualifications of a property character being required of persons who tender themselves as bail, when such persons have justified, i.e., esta-

PERFECTING BAIL—continued.

blished their sufficiency by satisfying the Court that they possess the requisite qualifications, a rule of Court is made for their allowance, and the bail is then said to be perfected, *i.e.*, the process of giving bail is finished or completed.

See also titles BAIL; JUSTIFYING BAIL.

PERFORMANCE. This, like payment, is the normal and natural mode of discharging an obligation. In Equity practice it has acquired a somewhat extended and peculiar development. Thus, when a person covenants to do an act, and without making any express reference to the covenant, he does an act which may either wholly or partially be taken as or towards a performance of the covenant, Equity imputes to him the intention, *i.e.*, implies an intention, on his part to perform the covenant. Cases of performance in Equity fall under two divisions, *viz.* :—

- (1.) Covenants to purchase and settle lands, and lands are, in fact, purchased, but no settlement thereof is made (*Willcocks v. Willcocks*, 2 Vern. 558); and
- (2.) Covenants to leave personal property, and the covenantee in fact receives property left by reason of the covenantor's intestacy. *Blandy v. Widmore*, 1 P. Wms. 823.

The rules applicable to both these groups of cases are the same, *viz.* :—

- (1.) When the lands purchased or personal property left by intestacy are of less value than the intention of the covenant, they go in part towards a performance of the covenant (*Lechmere v. Carlisle (Earl)*, 3 P. Wms. 211); and
- (2.) The omission of immaterial requisites to the due performance of the covenant will count for nothing, *e.g.*, the omission or neglect to obtain the trustee's consent to the purchase, or even to purchase the lands through the trustees as agents (*Sowden v. Sowden*, 1 Bro. C. C. 582); but
- (3.) There is no performance in these cases if the covenant is broken in the lifetime of the covenantor. *Oliver v. Brickland*, 3 Atk. 420.

See also title SATISFACTION.

PERJURY is defined by Coke to be a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears wilfully, absolutely, and falsely in a matter material to the issue or point in question. And under various modern statutes offences against veracity of the like sort, although not on oath, are rendered indictable and punishable as perjury, *e.g.*, in the case of the

PERJURY—continued.

declarations substituted for oaths. The Common Law penalty for perjury was fine and imprisonment at the discretion of the Court; the statute law penalty is under 2 Geo. 2, c. 25, s. 2, transportation or imprisonment with hard labour in the house of correction, for any term not exceeding seven years; and now penal servitude is, under 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47, substituted for transportation. Two witnesses are required to ensure a conviction for perjury.

PERMANENCY. Permanency signifies taking, receiving, enjoying, &c. Thus the permanency of the profits of an estate means the receipt or enjoyment of the profits, *e.g.*, "estates in possession are those where the tenant is entitled to the actual permanency of the profits" (2 Cruise, tit. "Remainder," s. 1); and he who is so in the receipt of the profits is termed the *permanor* of the profits.

PERPETUATING TESTIMONY OF WITNESSES.

When a party in a suit in equity is desirous of preserving the evidence of witnesses concerning a matter which cannot be immediately investigated in a Court of Law, or when he is likely to be deprived of the evidence of material witnesses by their death or departure from the realm, it is usual to file a bill in equity to perpetuate and preserve the testimony of such witnesses; and the Court then usually empowers certain persons to examine such witnesses, and to take their depositions. The evidence so taken is then available on any future trial, if the witness or witnesses should in the meantime have died, but not otherwise.

PERPETUITY. Various attempts have from time to time been made to keep land in a certain line or family in perpetuity, but the law disliking a perpetuity has frustrated every such attempt. The most noteworthy attempts have been the following :—

- (1.) Restraints imposed upon tenants in tail to prevent them from suffering a common recovery or a fine,—an attempt which was frustrated in *Mildmay's Case* (6 Rep. 40);
- (2.) Successive life estates, with a proviso for the creation of an ever-fresh succession of them,—an attempt which was frustrated in *Marlborough (Duke) v. Godolphin* (1 Eden, 404); and
- (3.) The creation of executory interests under the Statutes of Uses and of Wills (27 Hen. 8, c. 10, and 32 Hen. 8, c. 5),—an attempt which was frustrated in *Cadell v. Palmer*

PERPETUITY—continued.

(1 Cl. & F. 372), which case also established the Rule of Perpetuities in its present form, and which is in these words,—

Rule of Perpetuities or of Remoteness.—An executory interest cannot be created so as to take effect unless within a life or lives in being, twenty-one years afterwards, and (but only where gestation actually exists (*Cadell v. Palmer, supra*)) the period of gestation; or (where no life or number of lives is mentioned) within twenty-one years alone and (but only where gestation actually exists) the period of gestation (*Palmer v. Holford*, 4 Russ. 403). Moreover, all interests subsequent to and depending upon an executory interest which exceeds the limits of the rule are also void, notwithstanding in themselves they may be within the limits of the rule. *Palmer v. Holford, supra*; *Robinson v. Hardcastle*, 2 Bro. C. C. 22.

The rule is applicable to personal as well as to real estate.

In the application of the rule possible and not actual events are to be considered; so that if the executory interest which is given might by possibility exceed the limits of the rule, in other words would not necessarily take effect as a vested interest (if at all) within these limits, and whether as to all or as to one even of the beneficiaries, the interest is void. And not only must the interest vest, but the respective vested interests of the respective takers (where they are more than one) must also be ascertainable,* within the limits of the rule, otherwise the gift is void (*Curtis v. Lukin*, 5 Beav. 147); but it is not necessary that the interest having vested should also be in possession (*Murray v. Addenbroke*, 4 Russ. 407), the possession, if arbitrarily postponed beyond the vesting, being simply accelerated and brought up to the period of vesting.

The following are the chief examples of interests attempted to be created, but void as being against the rule,—

(1.) An executory interest to arise after an indefinite failure of issue, unless the prior interest can be construed as an estate tail by implication from the words describing the failure of issue, in which latter case the executory interest over would be good (*Doe d. Ellis v. Ellis*, 9 East, 383); *Grumble v. Jones*, Willes, 166, n.), the reason for the validity of the exception being that the gift over may be defeated by the estate tail being barred at any time before the event occurs on which the executory interest is to spring into being.

* *Mogg v. Mogg*, 1 Mer. 654, cannot be considered law.

PERPETUITY—continued.

Nicolls v. Sheffield, 2 Bro. C. C. 215; *Morse v. Lord Ormonde*, 5 Madd. 99.

(2.) An executory bequest, after a life estate in A. to the children of A. attaining any age which exceeds twenty-one years (*Leake v. Robinson*, 2 Mer. 363); and in such a case the whole bequest over is void, although some of the children may have attained the prescribed age within twenty-one years from the death of A., unless indeed the individual shares of the respective children can be ascertained within the limits of the rule of perpetuities, in which latter case the gift over would be valid as to those children who are within the rule and void only as to the others. *Storrs v. Benbow*, 2 My. & K. 46.

(3.) A devise to a child (not *in esse*) of A. who is *in esse* upon that child attaining some qualification which is not necessarily attainable within the limits of the rule, e.g., succeeding to a barony (*Tollemache v. Earl of Coventry*, 2 Cl. & F. 611), or being in holy orders. *Procter v. Bishop of Bath and Wells*, 2 H. Bl. 358.

(4.) A gift of leaseholds to trustees upon trusts corresponding with lands in strict settlement, and expressed as not to vest in any tenant in tail in possession till he shall attain the age of twenty-one years (*Ibbetson v. Ibbetson*, 5 My. & Cr. 26; *Lord Dungannon v. Smith*, 12 Cl. & F. 546); but it is otherwise if the gift is expressed not to vest in any tenant in tail by purchase under the settlement till such tenant attain the age of twenty-one years, and this latter is the common limitation.

(5.) The literal exercise of powers of appointment (not being *general*) in favour of objects who if inserted (as they must be considered as being) in the instrument (whether deed or will) creating the power, would take interests beyond the limits of the rule, as calculated from the date of the operation of the creating instrument (*Devonshire (Duke) v. Lord G. Cavendish*, 4 T. R. 741); nevertheless such a power is not void in its creation, and the donee of it may, by using discretion, exercise it in a valid manner. *Attenborough v. Attenborough*, 1 K. & J. 296.

(6.) The creation of powers of sale or management of estates exercisable generally during the minorities of persons entitled to the settled estates (*Ferrand v. Wilson*, 4 Hare, 373), such persons not being expressed to be entitled by purchase under the settlement; nevertheless, such powers, if intended for the payment off of incumbrances on the settled estates, would be valid. *Briggs v. Oxford (Earl)*, 1 De G. M. & G. 363.

The rule of perpetuities does not apply to executory trusts, or rather the Court of

PERPETUITY—continued.

Chancery, in moulding such trusts will take care not to exceed the limits of the rule (*Humberston v. Humberston*, 1 P. Wms. 332); neither does it apply to cases of *cy-près*, and for the like reason, that the Court coops up the excess within the lawful period of limitation (*Nicholl v. Nicholl*, 2 W. Bl. 1159). And there are also the following further exceptions to the application of the rule:—

(1.) Gifts to charities, *e.g.*, contingent limitations over from one charity to another charity (*Christ's Hospital v. Gratzinger*, 1 Mac. & G. 460): but not of course a gift or gift over in the like case from a charity to an individual. *Hope v. Glöster (Corporation)*, 7 De G. M. & G. 647.

(2.) Lands whereof the reversion or remainder subsists in the Crown (34 & 35 Hen. 8, c. 20), not being put into the Crown in fraud of the rule. *Johnson d. Anglessea (Earl) v. Derby (Earl)*, 2 Show. 104.

(3.) Any provision for the payment of the debts of the settlor (*Briggs v. Oxford (Earl)*, *supra*), including therein a provision to indemnify a purchaser against an incumbrance. *Masey v. O'Dell*, 10 Ir. Ch. Rep. 22.

See also title ACCUMULATIONS.

PERPETUITY OF THE KING. That fiction of the law which for certain political purposes ascribes to the king in his political capacity the attribute of immortality: for though the reigning monarch may die, yet by this fiction the king never dies; that is, the office is supposed to be re-occupied for all political purposes immediately on his death.

PER QUÆ SERVITIA. A judicial writ that issued out upon the note of a fine; and which lay for the connuse of a manor or seignory to compel the tenant of the land at the time the fine was levied to attorn to him. *Les Termes de la Ley*.

PERQUISITES. Such advantages and profits as come to a manor by casualty, and not yearly; as escheats, heriots, reliefs, estrays, and such like things. The word "perquisite" is also used by some of our old law writers to signify anything obtained by industry, or purchased with money, in contradistinction to that which descends from an ancestor (Cowel; *Les Termes de la Ley*.) It is also, at the present day, used of the casual profits of any office.

PER QUOD. When an action is brought by a person for defamation of character, and the offensive words do not apparently and upon the face of them import such

PER QUOD—continued.

defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod*: as if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can shew some special loss by it; in which case he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation of such a living. In all actions for slander, other than for slander to a person in his or her profession, trade, or occupation, it is necessary to add this *per quod* clause in effect, although no longer in form, inasmuch as damage is an essential part of the ground of action.

PERSONAL (personalis). Anything connected with the person, as distinguished from that which is connected with land. Another characteristic of personal property (or personality, as it is sometimes called) is, that it is usually of a transitory or moveable nature, and capable of being taken away by the owner wherever he pleases to go; whereas real property (or realty, as it is sometimes termed) is of a local and not transitory nature, and does not possess the attribute of mobility, or the capacity of being moved about with the person of the owner; and hence, from its substantial and permanent nature, it is termed real. Having stated thus much, it would be advisable further to illustrate the word by explaining it in conjunction with other words with which it is usually associated.

Personal Actions, for instance, signify such actions as are brought for recovery of some debt, or for damages for some personal injury; in contradistinction to the old real actions, which related to real or landed property, &c.

Personal Estate, property, things, or chattels, &c., signify any moveable things of whatever denomination, whether alive or dead; as furniture, money, horses, and other cattle, &c., for all these things may be transmitted to the owner wherever he thinks proper to go, and may therefore be said to attend his person, according to the maxim *Mobilia ossibus inherent*.

See also following titles.

PERSONAL PROPERTY. Property of a personal or moveable nature, as opposed to property of a local or immoveable character, such as land, or houses, and which are termed real property.

See also title PERSONAL.

PERSONALTY. Signifies generally any personal property, in contradistinction to realty, which signifies real property. In

PERSONALTY—*continued.*

our old law, an action was said to be in the personality when it was brought for damages out of the personal estate of the defendant. But see *Cowel* under this title.

PETITION IN CHANCERY. During the progress of a suit in Chancery the interference of the Court is frequently required in order to the regular and effectual prosecution or defence of the suit, and in order to the immediate attainment of many objects connected with it. When such interference is required, an order of Court, embodying the particular object, is applied for, and such application is frequently made by what is termed a petition, which is a statement in writing made to the Lord Chancellor, or the Master of the Rolls, shewing the cause which the petitioner has for some order of Court. Petitions to the Court of Chancery are either made in a suit or under a statute, or both; but where no suit is pending and no statute gives the right of proceeding upon petition, then a bill is the only course open to the suitor, unless in certain matters regarding *infants*, which may be done on petition without either suit or enabling statute.

PETITION OF RIGHT: *See* title *MONSTRANS DE DROIT*.

PETITION OF RIGHTS. A Parliamentary declaration of the liberties of the people assented to by King Charles I., in 1629. It is to be distinguished from the Bill of Rights, 1689, which was passed into a permanent constitutional statute.

See title *BILL OF RIGHTS*.

PETITIONING CREDITOR. The creditor at whose instance an adjudication of bankruptcy is made against a bankrupt. The debt of the creditor so petitioning required formerly to amount to £100, but if it amount to £50 that is now sufficient. Bankruptcy Act, 1869.

PETTY BAG OFFICE. Is an office which belongs to the Common Law Courts in Chancery, and out of which all writs in matters wherein the Crown is interested do issue. Such writs, and the returns to them, were in former times preserved in a little sack or bag (*in parva bagá*), whereas other writs, relating to the business of the subject, were originally kept in a hamper (*in hanaperio*), and thence has arisen the distinction of the Hanaper Office and Petty Bag Office, which both belong to the Common Law side of the Court in Chancery. 5 & 6 Vict. c. 103.

PETTY LARCENY: *See* title *LARCENY*.

PETTY SERJEANTY: *See* title *SERJEANTY*.

PETTY SESSION. A special or petty session is sometimes kept in corporations and counties at large by a few justices, for dispatching smaller business in the neighbourhood between the times of the general sessions; as for licensing ale-houses, passing the accounts of the parish officers, and so forth.

PETTY TREASON: *See* title *TREASON*.

PILOTAGE. The act of steering or guiding a ship by the pilot or helmsman, either during an entire voyage, or on the departure from, or on the approach to, port. The dangerous navigation of the coasts and of the rivers of England has led to the appointment of qualified persons, who receive a licence to act as pilots within a certain district, and who enjoy the monopoly of conducting vessels out of, and up, the various rivers, and to and from the various ports of the country. By different Acts of Parliament the master of every ship engaged in foreign trade must put his ship under the charge of a local pilot so licensed, both in his outward and in his homeward voyage. The power of appointing these "duly licensed pilots" is mainly vested in the corporation of the Trinity House, Deptford, whose jurisdiction extends from Orfordness to London Bridge, from London Bridge to the Downs, from the Downs westward to the Isle of Wight; and all bodies or persons having the power of appointment in other places (as the commissioners of the Cinque Ports, the Trinity Houses of Hull, Newcastle, and Liverpool) are, to some extent, subject to their authority. Where the master is bound by Act of Parliament to place his ship under the command of a licensed pilot, he is relieved from the liability of any damage which is done by it while so under the pilot's command. The rates of charge for pilotage are regulated partly by statute and partly by usage, but also by the corporation of the Trinity House. *See* *Maunder* and *Pollock* on Merchant Shipping.

PIN-MONEY. An allowance set apart by a husband for the personal expenses of the wife; *i.e.*, for the dress and pocket-money of the wife. It is that money which the husband allows the wife for the purpose of decking or attiring her person, or to pay her ordinary personal expenses. It is not a gift from the husband to the wife out and out; it is not to be considered like money set apart for the sole and separate use of the wife during coverture excluding the *jus mariti*; but is a sum set apart for a specific purpose; it is due to the wife in virtue of a particular arrangement, and is

PIN MONEY—*continued.*

payable by the husband by force of that arrangement only, and for that specific purpose and no other (*Howard v. Digby*, 8 Bligh's Rep. N. R. 269). Consequently, if pin-money should not be duly paid by the husband, and should be found to be in arrear at his death, his wife surviving him can claim only one year's arrears of it (*Aston v. Aston*, 1 Ves. Sen. 267); also, the husband may find his wife in apparel, instead of paying her this apparel-money, as it may be called. *Howard v. Digby*, *supra*.

PISCARY (*piscaria vel privilegium piscandi*). The right or privilege of fishing. Thus free fishery, which is a royal franchise, is the exclusive right of fishing in a public river. Common of piscary is the right of fishing in another man's water. Several fishery resembles free fishery, only that he who has a several fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite.

See also title **FISHERY**.

PIX JURY (from Lat. *Pyxis*, a box made of the box-tree (*Pyzacantha*), used by the ancients for gallipots, and to hold the Host in Catholic churches). A jury consisting of the members of the corporation of the Goldsmiths of the city of London, assembled upon an inquisition of very ancient date, called the trial of the pix. The object of this inquisition is to ascertain whether the coin of the realm, manufactured at Her Majesty's mint, is of the proper or legal standard. This investigation as to the standard of the coin is called piking it, and hence the jury appointed for the purpose is called a pix jury. The investigation takes place usually once a year, and the Lord High Chancellor presides, and points out to the jury the nature of their duties. They have to ascertain whether the coin produced is of the true standard, or "sterling" metal, of which, by stat. 25 Edw. 3, c. 13, all the coin of the kingdom must be made. This standard has been fixed at various times by statute; for it seemeth that the royal prerogative doth not extend to the debasing or enhancing the value of the coinage below or above the sterling value. 2 Inst. 577.

PLAINT (from the Fr. *plainte*, complaint). The instrument or process by which actions are commenced in the County Courts. It has been described as a private memorial tendered in open Court to the judge, wherein the party injured sets forth his cause of action.

See title **COUNTY COURTS**.

PLEA (*placitum*). Is used in various

PLEA—*continued.*

senses. In its usual acceptance it signifies the defendant's answer to the plaintiff's declaration; and when this answer sets forth at large or in detail the subject matter of the defence, it is denominated a special plea, in contradistinction to those direct and concise answers to the declaration termed the general issues. The word is also frequently used to signify suit or action. Thus holding pleas means entertaining or taking cognizance of actions or suits; common pleas signifying actions or suits between man and man, as distinguished from such as are promoted and prosecuted at the suit of the Crown, which are thence denominated pleas of the Crown. The word is used in this sense by Finch in defining an issue: "An issue is when both the parties join upon somewhat that they refer unto a trial, and to make an end of the plea, *i.e.*, suit or action. So the plea side of a Court means that department of a Court which takes cognizance of civil actions, as distinguished from criminal proceedings or matters which peculiarly concern the Crown." See Finch, Law, 396, c. 35; and see titles **ABATEMENT**, **PLEA IN**; **PEREMPTORY PLEA**.

PLEA SIDE. The plea side of a Court means that branch or department of the Court which entertains or takes cognizance of civil actions and suits, as distinguished from its criminal or Crown department. Thus the Court of Queen's Bench is said to have a plea side, and a Crown or criminal side; the one branch or department of it being devoted to the cognizance of civil actions, the other to criminal proceedings, and matters peculiarly concerning the Crown. So the Court of Exchequer is said to have a plea side and a Crown side; the one being appropriated to civil actions, the other to matters of revenue.

PLEAD. The defendant in an action is said to plead when he delivers his answer to the plaintiff's declaration; because his answer itself is called a plea. Steph. Plead. 52.

PLEADING ISSUABLY. Pleading such a plea as is calculated to raise a material issue either of law or of fact. The defendant in an action is entitled, as a matter of right, to a certain number of days to plead. If he seeks to obtain further time, it is granted to him only by way of indulgence; and the Court in so doing usually annexes to its order the condition that the defendant shall plead issuably, that is, that he shall plead a fair and *bonâ fide* plea, as distinguished from one which is calculated only to embarrass the defendant, and to retard the progress of the action. The con-

PLEADING ISSUABLY—*continued.*

dition so annexed is in effect, "an agreement by the defendant to speed the cause to its conclusion, and bring it to an issue upon the substantial merits of law or fact, without regard to any formal inaccuracies in the plaintiff's statement." *Per Coleridge, J., in Barker v. Gleadow*, 5 Dowl. 136.

See also title **ISSUABLE PLEA**.

PLEADING OVER. Passing over, passing by, omitting to take notice of, &c. Thus, when a defendant in his pleadings passes by or takes no notice of a material allegation in the declaration, he is said to plead over it.

PLEADINGS. The mutual allegation or statements which are made by the plaintiff and defendant in a suit or action are so termed. These are now written or printed and delivered between the contending parties, or to the proper officers appointed to receive them; but formerly they were actual *rius roce* pleadings in open Court. The pleadings in an action are designated according to their nature by the following terms: declaration, plea, replication, rejoinder, surrejoinder, rebutter, and surrebutter. The principles on which these pleadings or contending statements are framed, and the manner in which they govern or affect the subsequent course of the cause, form the principal feature in the art or science of pleading, or, as it is popularly called, special pleading. See *Read v. Brookman*, 3 T. R. 159, *per Buller, J.*; *Steph. Pl.* 24; and the particular titles mentioned in the course of this present title.

PLEDGE: See titles **BAILMENT**; **PAWN-BROKER**.

PLEDGES. In the ancient law no person could prosecute a civil action without having in the first stage of it two or more persons as pledges of prosecution; and if judgment was given against the plaintiff, or he deserted his suit, both he and his pledges were liable to amercement to the king *pro falso clamore*. In the course of time, however, these pledges were disused, and the names of fictitious persons substituted for them, two ideal persons, John Doe and Richard Roe having become the common pledges of every suitor; now, however, even these are not used in personal actions. And since the O. L. P. Act, 1852, the use of such pledges has been discontinued even in the action of ejectment; and inasmuch as all the real actions were abolished by 3 & 4 Will. 4, c. 27, it would seem that the use of such pledges is now discontinued altogether.

PLENARTY. Is applied to a benefice being full or occupied, and is directly opposed to vacation, which signifies a benefice being void.

PLENARY CAUSES. In the Ecclesiastical Court causes were divided into plenary and summary. Plenary causes were those in whose proceedings the order and solemnity of the law was required to be exactly observed, so that if there were the least departure from that order, or disregard to that solemnity, the whole proceedings were annulled. Summary causes were those in which it was unnecessary to pursue that order and solemnity. The present distinction between the contentious and the non-contentious jurisdiction of the Court of Probate seems to be very closely analogous to this old distinction between causes as plenary or summary.

PLENE ADMINISTRAVIT. A plea pleaded by an executor or administrator, on an action being brought against him, to the effect that he has fully administered, that is, that he has exhausted the assets before such action was brought. *Toller's Exec.* 267.

PLIGHT. An old English word, signifying the habit or quality of anything. Thus, to deliver up a thing in the same plight and condition, or to be in the same plight and condition, are phrases analogous to the phrase "assemble and meet together," the latter of the two words explaining the former of them, but being otherwise tautological. This use of the word "plight" is the same as that which occurs of the word "*causa*" in *Just. Inst.* iv. 17, 3. The word applies to real and personal property equally, and to any estate, even to a rent-charge or possibility of dower, in land. This seems to be the meaning of Cowel, title **Plight**.

PLOUGH-BOTE. An allowance of wood which tenants are entitled to, for repairing their implements of husbandry.

PLURIES. A writ of summons or *capias* was termed a *pluries* writ, when two other writs had been issued previously, but to no effect; and it was so termed, because the words ran thus: "You are commanded as *often* you have been commanded" (alluding to the commands contained in the two previous writs) (*Smith's Action at Law*, 63). But the *pluries* writ is now abolished, and by s. 11 of the O. L. P. Act, 1852, the original writ may be renewed at any time before its expiration for six months from the date of such renewal, and so on from time to time during the currency of the renewal writ, thus renewal saving the Statute of Limitations as from the date of the original writ.

POCKET SHERIFFS. Sheriffs appointed by the sole authority of the Crown without the interposition of the judges.

POLICE. Regarding the police of the metropolis (see title METROPOLITAN POLICE). With reference to police generally, these are of various degrees. (1.) The high constable of a county, appointed by the justices of the county at quarter sessions, and not at petty sessions (*Reg. v. Wilkinson*, 10 A. & E. 288); (2.) Special constables who are appointed for cases of sudden public tumult, or other like emergency, under the stats. 1 & 2 Will. 4, c. 41, and 5 & 6 Will. 4, c. 43; (3.) County and district constables, being the regular officers of police for counties and districts, appointed under the stats. 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 19 & 20 Vict. c. 69; and (4.) Parish constables, being principally the officers of police in towns, appointed under the stat. 5 & 6 Vict. c. 109, and some Amendment Acts, and whose duties are regulated by the Town Police Clauses Act, 10 & 11 Vict. c. 89.

By the constitution of England, every man is responsible for the preservation of the public peace (see title FRANKPLEDGE); and if any one upon being duly called upon by the magistrates to serve as a special constable refuses to do so, the magistrates may and ought to cause him to be indicted (*Reg. v. Vincent*, 9 C. & P. 91). A special constable, when duly appointed, is appointed for an indefinite time, and until, in fact, his services are either determined or suspended; and during the term of his office he has all the authority of an ordinary constable. The office, it appears, may be served by deputy (*Rez v. Clarke*, 1 T. R. 679); but a naturalised foreigner may not serve either as deputy or as principal. *Rez v. Ferdinand de Mierre*, 5 Burr. 2787.

In the case of a breach of the peace actually continuing, or reasonably likely to be renewed, any private person may arrest the offenders, or any of them; but when the affray is over he may not do so, nor even require a policeman, who has not seen the affray, to do so (*Baynes v. Brewster*, 2 Q. B. 375). In the case of a felony being actually committed, he may arrest the felon; and in case the felony is completed, he may give the felon in charge to a policeman (*Atkinson v. Warne*, 1 Cr. M. & R. 827). All these things he may do without warrant, and, *à fortiori*, a regular policeman may and ought to do the like. But further, in the case of a felony actually committed, a policeman may, upon probable suspicion merely, arrest the felon without a warrant, and may even break open doors, and, if necessary for his apprehension, kill the felon (*Hogg*

POLICE—continued.

v. Ward, 3 H. & N. 417). A warrant for the apprehension is a protection to the constable in all cases, unless where it shews upon the face of it a total want of jurisdiction. *The Marshalsea Case*, 10 Rep. 68.

POLICY OF ASSURANCE, or INSURANCE: See title INSURANCE.

POLL. Deeds are sometimes called deeds-poll, in contradistinction to deeds indented or indentures; deeds-poll being shaved or polled quite even.

See title DEED-POLL.

POLLS, CHALLENGE TO: See title CHALLENGE.

PONE. An original writ, formerly used for the purpose of removing suits from the Court Baron, or County Court, into the superior Courts of Common Law. It was also the proper writ to remove all suits which were before the sheriff by writ of justices (*Les Termes de la Ley*). But this writ is now in disuse, the writ of *certiorari* being the ordinary process by which at the present day a cause is removed from a County Court into any superior Court.

POOR. Upon the dissolution of the monasteries in the reign of Henry VIII., it became necessary to make some provision for the poor, as well those who were properly called *indigent*, i.e., unable, even with labour, to earn their own livelihood, as also those who were properly called *poor*, i.e., unable to live without labour. The oldest Poor Law Act (43 Eliz. c. 2) preserves this distinction; but abuses arising out of it, of which the principal one, perhaps, was the extension of out-door relief to able-bodied paupers, the whole system of Poor Law administration was re-modelled by the stat. 4 & 5 Will. 4, c. 76, and has since been still further improved. Under the stat. 4 & 5 Will. 4, c. 76, which continued in force until 31st of July, 1847, the administration of relief to the poor throughout England and Wales, was placed under the control of three commissioners, styled, "The Poor Law Commissioners for England and Wales;" but under the stat. 10 & 11 Vict. c. 109, a new board of commissioners, styled, "Commissioners for Administering the Laws for the Relief of the Poor in England," was appointed in their place, and was invested with all the powers and duties of the former commissioners; the style has been since altered by the stat. 12 & 13 Vict. c. 103, to that of the "Poor Law Board," and the Board under that name has been perpetuated by the stat. 30 & 31 Vict. c. 106.

POOR—*continued.*

If an order of the Poor Law Board is questioned, its legality is to be determined on removal by *certiorari*; and in default of such removal, a *mandamus* will go to enforce it. *Reg. v. Oldham Union (Overseers)*, 10 Q. B. 700.

Under the stats. 4 & 5 Will. 4, c. 76, and 7 & 8 Vict. c. 101, the Poor Law Board may form unions, and may either separate parishes from, or add parishes to, existing unions, without the consent of the guardians of the union; and the Board may also direct that there shall be a specified number of guardians of each union; but at the same time justices residing in extra-parochial places within unions are *ex officio* guardians of unions. Generally, the guardians act in all matters of importance under the sanction only of the Poor Law Board. The guardians of each union constitute a corporation, and have power to contract, without affixing their seal, in all matters necessarily or properly incident to their office (*Pain v. Strand Union (Guardians)*, 8 Q. B. 326. (See also title CORPORATIONS.)) The clerks of the boards of guardians may, although not certificated attorneys, conduct proceedings before justices at petty sessions, and out of sessions, on behalf of the boards.

Under the stat. 43 Eliz. c. 2, the churchwardens of every parish, and four, three, or two, substantial householders, then to be nominated by the magistrates, were to be overseers of the poor; but under 13 & 14 Car. 2, c. 12, in large parishes there are to be two or more overseers for every township or village; and by stat. 54 Geo. 3, c. 91, the appointment is to be annual.

POPULAR ACTIONS. Such actions as are maintainable by any of Her Majesty's subjects for recovery of the penalty incurred by transgressing some penal statute. It is called a popular action because it is a proceeding which may be taken not by any one person in particular, but by any of the people who think proper to prosecute it (Cowell, title "Action, Popular"). These are the *Publica* (i.e., *Populica*) *Judicia* of Roman Law.

PORT (*portus maris*). A port is a haven, and somewhat more. 1st. It is a place for arriving and unlading of ships or vessels. 2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege. 3rd. It hath a ville, or city, or borough, that is, the *caput portus*, for the receipt of mariners and merchants, and the securing and vending of their goods, and victualling their ships. So that a port is *quid aggregatum*, consisting of somewhat that is natural, viz., an

PORT—*continued.*

access of the sea, whereby ships may conveniently come; safe situation against winds, where they may safely lie, and a good shore where they may well unlade; something that is artificial, as quays, and wharves, and cranes, and warehouses, and houses of common receipt; and something that is civil, viz., privileges and franchises, viz., *jus applicandi*, *jus mercandi*, and divers other additaments given to it by civil authority. A port of the sea includes more than the bare place where the ships unlade, and sometimes extends many miles; as the port of London, in the time of King Edward I., extended to Greenwich; and Gravesend is also a member of the port of London; so the port of Newcastle takes in all the river from Sparhawk to the sea. Hale, *de Portibus Maris*, *par.*, sec. c. 2.

PORTION DISPONIBLE. In French Law, a parent leaving one legitimate child may dispose of one-half only of his property; leaving two, one-third only; and leaving three or more, one-fourth only; and it matters not whether the disposition is *inter vivos*, or by will.

PORTIONER. When a parsonage is served by two, or sometimes three, ministers, alternately, the ministers are termed portioners, because they receive but a portion or proportion of the tithes or profits of the living. Cowel.

PORTMOTE, or PORTMOOT (from *portus*, a port, and *gemote*, an assembly). A Court kept in haven towns or ports. *Les Termes de la Ley*.

PORT-REVE (from *port*, an haven or harbour, and *reve*, an officer, minister, or bailiff, who does business for another man). The port-reve was the king's bailiff, who looked after the customs and tolls in the port of London, before they were let to farm. (Brady on Bor., 16, fol. ed.) This office, it is believed, is not peculiar to the port of London.

POSSE COMITATUS. The *posse comitatus*, or power of the county, was the power given to the sheriff and other of the king's officers by Act of Parliament, namely, the Statute of Winchester, or Winton, to compel the attendance of the inhabitants of the county (with some exceptions), to assist him in preserving the peace, in pursuing and arresting offenders, and in such like acts where assistance was requisite. The *posse comitatus* being thus in a manner organized, was capable of serving as a militia for the defence of the county against the Scots and other foreign invaders.

See title ARMY.

POSSESSIO FRATRIS. Possession or seisin of the brother. It used to be a maxim, that *possessio fratris facit sororem esse heredem*, that is, that the possession or seisin of a brother would make his sister of the whole blood his heir in preference to a brother of the half blood. The question of the possession or seisin of the ancestor is not, since the Descent Act (3 & 4 Will. 4, c. 106), of any importance in ascertaining who is heir, inasmuch as the descent is now traced from the last person entitled who did not inherit and not from the last person seised.

There was no *possessio fratris* of a dignity, so that a half brother always succeeded in preference to a whole sister.

POSSESSION : See title **SEISIN**.

POSSESSION MONEY. The man whom the sheriff puts in possession of goods taken under a writ of *fiat facias* is entitled whilst he continues so in possession to a certain sum of money *per diem*, which is thence termed possession money. The amount is 3s. 6d. per day if he is boarded, or 5s. per day, if he is not boarded.

POSSESSORY ACTION. An action which has for its object the regaining possession of the freehold, of which the demandant, or his ancestors, has been unjustly deprived by the present tenant or possessor thereof.

POSSIBILITY. An uncertain thing, which may or may not happen: such, for instance, as the chance of an heir apparent succeeding to an estate, or of a relation obtaining a legacy on the death of a kinsman. A possibility is said to be either near or remote; as for instance, when an estate is limited to one after the death of another, this is a near possibility; but that a man shall be married to a woman and then that she shall die, and he be married to another, this is a remote possibility. The rule against Perpetuities (see that title), and the rule against Remoteness (see that title), are commonly ascribed to the circumstance that the law (like any other practical person), refuses to act or decide, *i.e.*, determine, upon a double contingency, and waits until the same becomes a simple contingency by the happening of the one event.

POSTEA. Is a formal statement indorsed on the *nisi prius* record (see that title) of the proceedings at the trial. It takes up the story where the *nisi prius* record terminates. It is so called because it commences with the word *afterwards* (*postea*); and it proceeds to state the appearance of the parties, and of the judge and jury at the place of trial, and the ver-

POSTEA—continued.

dict of the jury on the issues joined. Sm. Action at Law. 159.

POSTERIORITY. This is a word of comparison and relation in tenure, the correlative of which is the word "priority." Thus, a man who held lands or tenements of two lords was said to hold of his more ancient lord by priority, and of his less ancient lord by posteriority. Old Nat. Brev. 94.

But the word has also a general application in law consistent with its etymological meaning, and as so used it is likewise opposed to priority.

POST-NUPTIAL (after marriage). Thus an agreement entered into by a father after the marriage of his daughter, by which he engages to make a provision for her, would be termed a post-nuptial agreement.

See further title **MARRIAGE SETTLEMENTS**.

POST-OBIT BOND. A post-obit bond is an agreement on the receipt of money by the obligor to pay a larger sum exceeding the legal rate of interest upon the death of the person from whom he, the obligor, has some expectations if he survive him. *Chesterfield v. Jameson*, 2 Ves. 157.

POST OFFICE. This is the office for the conveyance or transmission of letters through the kingdom from place to place within it, and also from foreign parts. It was first attempted to be established by the Long Parliament, in 1643, and was afterwards established by Cromwell, in 1657, and confirmed by the Act 12 Car. 2, c. 35. One of the reasons inducing the government of the day to establish one General Post Office, was the facility which it afforded by opening letters of discovering secret conspiracies against the government (9 Anne, c. 10); and this right of the government is reserved in all the subsequent statutes, and is exercised upon a warrant from one of the principal Secretaries of State. The principal statutes at present in force regarding the Post Office, are,—

- (1.) 7 Will. 4 & 1 Vict. c. 33, for the management of the Post Office and the protection of its exclusive privileges;
- (2.) 3 & 4 Vict. c. 96, and 10 & 11 Vict. c. 85, for the establishment of a penny postage;
- (3.) 18 & 19 Vict. c. 27, for the transmission of newspapers;
- (4.) 23 & 24 Vict. c. 111, for the sale of postage stamps; and
- (5.) 33 & 34 Vict. c. 79, for halfpenny post-cards.

POSTULATION (*postulatio*). A petition. Formerly, on the occasion of a bishop being translated from one bishopric to another, he was not elected to the new see, for the rule of the Canon Law is *electus non potest eligi*; and the pretence was, that he was married to the first church, which marriage could not be dissolved but by the pope: and thereupon he (*sc.* the pope) was petitioned, and consenting to the petition, the bishop was translated; and this was said to be by postulation; but this was restrained by 16 Ric. 2, c. 5. Cowel; Tomlins.

POUNDAGE, SHERIFFS. Is an allowance to the sheriff of so much in the pound upon the amount levied under an execution. The object of this allowance is to remunerate the sheriff for the risk and trouble which are incident to the performance of this branch of his duties. Originally, or at Common Law, the sheriff was entitled to no allowance for executing writs, his office being regarded solely as an honorary one, and hence it was that men of wealth and substance were usually elected to fill this post. In the progress of society, however, and on the growth of commerce, the duties of a sheriff being attended with considerable expense, and the office thereby becoming extremely onerous, the Legislature has, by different Acts of Parliament, entitled them to certain fees and dues, amongst which the above is included. Dalton's Office of Sheriff.

POUND BREACH. Is the act of breaking into a pound or inclosure in which things distrained are placed under the protection of law; and it is hence in the eye of the law even where the distress has been taken without just cause; for when once impounded, the goods immediately are in legal custody. The punishment for such offence varies according to the nature of the thing distrained; but in case of distress *damage feasant*, it is, by 6 & 7 Vict. c. 30, fixed at a penalty not exceeding £5, and the payment of all expenses. Co. Litt. 47.

POURPRESTURE (from the Fr. *pourpris*, an inclosure). The wrongful inclosing another man's property, or the encroaching or taking to one's self that which ought to be in common. It is perhaps more commonly applied to an encroachment upon the property of the Crown, either upon its demesne lands, or in the highways, rivers, harbours, or streets. 2 Co. Inst. 38, 271.

POURVEYANCE: See title PRE-EMP-TION.

POWER. A power is an authority which one person gives to another, autho-

POWER—continued.

rizing him to act for him, and in his stead. Powers by the Common Law were divided into two sorts, naked powers or bare authorities, and powers coupled with an interest. Thus, when a man devises that his executors shall sell his land, this power is a naked one, that is, the power which the testator so gives to his executors to sell his land is simply a power, and does not vest any interest in the land in the executors; whereas, if a man devises lands to his executors to be sold, this is a power coupled with an interest. The word "power" retains the same meaning when coupled with other words; thus, a power of attorney, or letter of attorney, signifies an authority which one man gives to another to act for him; and these powers are perhaps of the most frequent occurrence, being resorted to whenever circumstances are likely to occur to prevent a party doing the act desired to be done himself; as, for instance, if it were necessary that a person should sign a deed next week, but which he could not do, being obliged to set out upon a voyage to a foreign country before that time, in this case he might authorize some other person to do it for him, and the instrument by which he would confer that authority would be a power of attorney. (See that title.) 4 Cruise, 145.

Powers are otherwise arranged in the following threefold division, namely:—

I. Powers simply collateral.

II. Powers not simply collateral, but being either

- (1.) Appendant or annexed to an estate, or
- (2.) In gross, not being incident to any estate.

A power simply collateral is one which is not, and has never been, annexed to an estate; all other powers are either so annexed, or having once been so have become disannexed, in which latter case they are said to be powers in gross. Where the donee of a power to appoint lands is also the fee simple owner of the lands, he may convey the lands for any estate, either in exercise of his power, or in virtue of his estate; but having done so in either of these two ways, he cannot afterwards make any conveyance in the other way, which would be in derogation of his first conveyance, which for that reason is said to have either suspended or extinguished his power, according to the quantity of the estate which he has already created.

See also title APPOINTMENT.

POWER OF APPOINTMENT: See title CONVEYANCES.

POWER OF ATTORNEY: See title ATTORNEY, POWER OF.

POWER OF THE COUNTY: See title *POSS. COMITATUS*.

POYNINGS' LAW. An Act of Parliament made in Ireland in the reign of Henry VII., by which it was enacted that all statutes made in England before that time should be in force in Ireland. It was so called because Sir Edward Poyning was lord-lieutenant there at the time it was made. 12 Rep. 190.

PRACTICE COURT, QUEEN'S BENCH. Is a Court attached to the Court of Queen's Bench, and presided over by one of the judges of that Court, in which points of practice and pleading are discussed and decided. After the appointment of an additional judge to the Court of King's Bench, under the authority of 11 Geo. 4 & 1 Will. 4, c. 70, s. 11, which took place in Michaelmas Term, 1830, Lord Tenterden, then being the Lord Chief Justice, informed the Bar that in addition to the powers already exercised by one judge sitting apart from the others in the Bail Court (or Court in which the sufficiency of parties as bail, and other minor matters, are ascertained), all matters of practice would for the future be determined there. Since then it has become usual to move in this Court, in certain cases, for new trials; and in ordinary cases for writs of *mandamus* and of prohibition, in addition to mere points of practice. If any doubt arises in the mind of the presiding judge as to any question brought before him, he refers the party to the full Court, before which indeed cause, on rules *nisi*, is generally shewn; but the decision of the single judge is of itself conclusive. The four *puisne* judges by turns preside for the space of a term. This Court, though frequently and properly termed the "Practice Court of the Queen's Bench," is now generally called, from its origin, the Bail Court.

See title *BAIL COURT*.

PRECIPE. An original writ in the alternative, commanding the defendant to do the thing required, or to shew his reason for not doing it. This writ was used when something certain was demanded by the plaintiff, which it was incumbent on the defendant himself to perform; as to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, and the like. The word *precipe* is now commonly used for a sort of abstract of a writ of summons, or *capias*, which is made out on a slip of paper and delivered to the signer of the writs at the time of issuing them; and from which abstract or memorandum that officer makes his entry in the book kept for that purpose.

See also following titles.

PRECIPE IN CAPITE. When one of the king's immediate tenants *in capite* was deforced, his writ of right was called a writ of *precipe in capite*.

PRECIPE QUOD REDDAT. A writ of great diversity, extending as well to writs of right as to writs of entry. It was sometimes called a writ of right close, when issuing out of Chancery close; sometimes a writ of right patent, when issuing out of Chancery patent, or open. (Fitz. Nat. Brev. c. 1.

PRECIPE, TENANT TO THE: See title *TENANT TO THE PRECIPE*, and also title *FINE*.

PRECIPIUT CONVENTIONNEL. In French Law, under the *régime en communauté* (see that title), when that is of the conventional kind, if the survivor of husband and wife is entitled to take any portion of the common property by a paramount title and before partition thereof, this right is called by the somewhat barbarous title of the conventional *preciput*, from *præ*, before, and *capere*, to take.

PRÆMUNIRE (from *præmonere*, to forewarn, &c.) A species of offence affecting the king and his government, though not subject to capital punishment. When any one is said to incur a *præmunire*, it signifies that he incurs the penalty of being out of the king's protection, and of having his property forfeited to the king. It is so called from the words of the writ preparatory to the prosecution thereof, viz., "*præmunire facias*," i.e., cause A. B. to be forewarned that he appear, &c. This writ is itself frequently called a *præmunire*. 3 Inst. 110.

There was also a celebrated Statute of *Præmunire* (15 Ric. 2, c. 5), which was enacted to check the exorbitant power claimed and exercised by the Pope in England; whence the offence of *præmunire* was the particular name of the offence of maintaining the papal power in England as an *imperium in imperio*. The statute enacts, that whoever procures at Rome or elsewhere any translations, processses, excommunications, bulls, instruments, or other things which touch the king, against him, his crown and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council, or process of *præmunire facias* shall be made out against him, as in any other case of *Provisors*.

See also title *PROVISORS*.

PRAYER OF PROCESS. A prayer or petition with which a bill in Equity used to conclude, to the effect that a writ of subpoena might issue against the defendant to compel him to answer upon oath all the matters charged against him in the bill.

See title **SUBPOENA**.

PREAMBLE OF A STATUTE. The introducing clause or section of a statute is so termed. It usually recites the objects and intentions of the Legislature in passing the statute, and frequently points out the evils or grievances which it was the object of the Legislature to remedy. Although the preamble is generally a key to the construction, yet it does not always open or disclose all the parts of it; as sometimes the Legislature, having a particular mischief in view, which was the primary object of the statute, merely state this in the preamble, and then go on in the body of the Act to provide a remedy for general mischiefs of the same kind, but of different species, neither expressed in the preamble, nor perhaps then contemplated by the framer thereof (*Mann v. Cammel*, Loft. 783). A reference to the preamble is therefore only an insufficient guide to the true interpretation of the statute.

PRE-AUDIENCE. The precedence of being heard, which prevails at the Bar according to the rank which the counsel respectively hold. In the Court of Exchequer there are two barristers appointed by the Lord Chief Baron, called the post-man and the tub-man (from the places in which they sit), who take precedence in motions.

PREBEND. The rents and profits (*præbenda*) belonging to a cathedral church, or the endowment in land or money given to it for the maintenance of the dean, chapter, and spiritual officers connected therewith. A prebendary, vulgarly called a prebend, is one of this ecclesiastical body who are so maintained. Cowel.

PREBENDARY (*prebendarius*): See title **PREBEND**.

PRECEDENT CONDITION: See title **CONDITIONS**.

PRE-EMPTION (*præ emptio*). The prerogative of purveyance, or pre-emption, was a right enjoyed by the Crown of buying up provisions and other necessities by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owners; and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads,

PRE-EMPTION—continued.

in the conveyance of timber, baggage, and the like. This prerogative of the Crown appears to have been made the occasion of much abuse in the early reigns, as one of the chief constitutional struggles of the period was the restriction and regulation of this right.

PREFER, TO. To bring before, to prosecute, to try, to proceed with. Thus, preferring an indictment signifies prosecuting or trying an indictment.

PREGNANCY, PLEA OF. A plea which a woman capitally convicted may plead in stay of execution; for this, though it is no stay of judgment, yet operates as a respite of execution until she is delivered.

PREMISES. Matter previously stated or set forth is frequently so termed. In a deed, the premises comprise all that portion which precedes the *habendum*, i. e., the date, the parties' names and descriptions, the recitals, the consideration and the receipt thereof, the grant, the description of the things granted, and the exceptions (4 Cr. Dig. 26). So, in pleading, the word is used, in its logical sense, as signifying foregoing statements or previously-mentioned facts. Thus, in a declaration in *indebitatus assumpsit*, the plaintiff, after alleging that the defendant was indebted to him in a given sum of money, proceeded to state that, in consideration of the premises, the defendant promised to pay him the same. So, again, in a declaration for the diversion of water from a water-course, the plaintiff, after stating his right to the enjoyment of the water, and his previous user of the same, and setting forth the fact and the nature of the diversion, then proceeds to point out the injurious consequences which have flowed from the previously-stated facts, in the following manner: "And the plaintiff, by reason of the premises, hath been deprived of the use, benefit, and advantage of the water of the said water-course."

The common use of the word "*premises*," as in the phrase "eligible premises," is an abusive use of the word, derived apparently from the frequency with which the word is used in conveyances and leases of lauds and houses.

PREROGATIVE (from *præ*, before or above, and *rogo*, to ask or demand). By prerogative is meant some exclusive pre-eminent power or right. Thus, the king's prerogative is usually understood to be that special pre-eminence which the king has over and above all other persons, and out of the ordinary course of the Common Law, in right of his regal dignity. Thus, the power of making war or peace, of

PREROGATIVE—*continued.*

making treaties, leagues, and alliances with foreign states and princes; of appointing ports and havens, or such places only for persons and merchandize to pass into and out of the realm as he in his wisdom sees proper, are all instances of the king's prerogative. The greater part of early constitutional history consists in the struggles of Parliament to restrain the royal prerogative (*see* title CONSTITUTION, GROWTH OF). And at the present day the law regarding the prerogative exhibits exactly the reverse peculiarity, viz. that the Crown may not of its own authority diminish its prerogative, although with the authority of parliament it may do so (*Ex parte Eduljee Byramjee*, 5 Moo. P. C. C. 276). And generally the sovereign may not exercise his prerogative in contrariety to the Common Law; and although he may by his prerogative establish Courts to proceed according to the Common Law, he cannot create any new Court to administer any other law. *In re Natal (Bishop)*, 3 Moo. P. C. C. (N.S.) 115.

PREROGATIVE COURT: *See* title COURTS ECCLESIASTICAL, s. 5.

PREROGATIVE LAW. That part of the Common Law of England which is more particularly applicable to the king. *Com. Dig. tit. "Ley."* (A).

PRESERVE, TO. To assert a right or title to the enjoyment of a thing on the ground of having hitherto had the uninterrupted and immemorial enjoyment of it. *See* title PRESCRIPTION.

PRESCRIPTION (*prescriptio*). A title which a person acquires to incorporeal hereditaments by long and continued possession. Every species of prescription by which property is acquired or lost is founded on this presumption, that he who has had a quiet and uninterrupted possession of anything for a long period of years is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it. This mode of acquisition was well known in the Roman Law by the name of *usucapio*, because a person who acquired a title in this manner might be said *usu rem capere*. Before the Act of 2 & 3 Will. 4, c. 71, the possession required to constitute a prescription must have existed time out of mind, or beyond the memory of man, as it is also termed, that is, before the reign of Richard I.; but now, the period of possession necessary to constitute a title by prescription is in many cases by the above Act considerably shortened.

See titles COMMONS; EASEMENTS; PROFITS A PRENDRE.

PRESENTATION (*presentatio*). The act of a patron or proprietor of a living offering or presenting a clerk to the ordinary. This is done by a kind of letter from the patron to the bishop of the diocese, in which the benefice is situated, requesting him to admit to the church the person presented. 3 Cruise, 14.

See also title NOMINATION.

PRESENTATIVE ADVOWSON: *See* title ADVOWSON.

PRESENTEE. He who is presented to a living by the patron thereof.

PRESENTMENT. This word has various significations. In its relation to criminal matters it signifies the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel and the like; upon which the officer of the Court must afterwards frame an indictment before the party presented can be put to answer it. The word, as used in reference to admissions to copyholds, signifies an information made by the homage or jury of a Court Baron to the lord, by way of instruction, to give the lord notice of the surrender and of what has been transacted out of Court (5 Cruise, 502). But the necessity of the latter presentment has been abolished by 4 & 5 Vict. c. 35.

See title COPYHOLDS.

PRESS, LIBERTY OF. Upon the art of printing becoming general, the press was subjected to a rigorous censorship, first on the part of the Church, and latterly on the part of the State. Thus, in the reign of Elizabeth, printing was interdicted, save in London, Oxford, and Cambridge. In the reign of James I. the first newspaper was attempted to be printed, but that king and his successor endeavoured to silence the same by means of the Star Chamber jurisdiction. In 1641, when the Star Chamber was abolished, newspapers promised to become more abundant, especially as the mind of the nation was at that time in a very active and even excited state; but the Long Parliament by various ordinances endeavoured to restrain printing, at least on the part of the Royalist and Prelatical party. This conduct on the part of the Long Parliament was the occasion of Milton's treatise, entitled "*Areopagitica*, A Speech for Liberty of Unlicensed Printing." Upon the Restoration, in 1660, the Licensing Act (13 & 14 Car. 2, c. 33) was passed, which placed printing under the control of the Government, and in particular confined the trade to London, York, Oxford, and Cambridge, limiting also the number of master printers to twenty;

PRESS, LIBERTY OF—*continued.*

moreover, it imposed the severest and most degrading punishments on offenders against the Act. The Licensing Act expired in 1695, after various periods of renewal, and was not again re-enacted, it having been the opinion of Scroggs, C.J., and of the twelve other Common Law judges, that the Common Law was sufficient of itself, and without any statute to repress the publication of any matter without the king's licence, and the liberal opinions which sprung up after the Revolution of 1688, preferring to entrust the control of the press to the ordinary jurisdictions at Common Law.

From this date newspapers rapidly increased, and in the reign of Anne began to be published regularly, and some even daily; and in that reign they began for the first time to combine political discussion with matters of intelligence, and were subject only to the two following restraints:—

- (1.) The stamp duty on newspapers, which was imposed for the first time in 1712; and
- (2.) The law of libel.

These two restraints have been since gradually removed or relaxed: thus,—

(1.) The tax upon newspapers, which was 4d. in the reign of Anne, was reduced to 1d. in 1836, and was repealed altogether in 1855, and ultimately, in 1861, the duty upon paper also was repealed.

(2.) The law of libel was at first extremely severe, any reflection upon the Government, or upon ministers, being construed into a reflection upon the king himself, and therefore as a seditious libel. This state of the law of libel was rendered all the worse by reason of the then doctrine of the Common Law, that the jury could only find the particular fact of publication, and not a general verdict of libel or no libel, that matter being left to the judges, who (as being the servants of the Crown) were naturally suspected of being disposed towards the Crown. And although in the *Case of the Seven Bishops* (1687), the jury brought in a general verdict of no libel, yet that precedent was insufficient of itself to change the law, more especially as it was given in bad times. It was left to Mr. Erskine, in the *Case of the Dean of St. Asaph* (1778), to advocate the right of the jury in actions of libel to find a general verdict, and to Mr. Fox, in his Libel Act, 1792, to confer that right upon the jury. By a later Act (6 & 7 Vict. c. 96), it was for the first time rendered competent to a defendant to plead in defence or justification the truth of the matters published, and that the same were so published for the public good.

PRESUMPTION (*presumptio*).

That which is presumed or believed in the absence of any direct evidence to the contrary. A presumption, or that which is presumed, has been denominated a violent, a probable, or a light presumption, according to the amount of weight which attaches to it. Thus, if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent or strong presumption of his having paid the former rent, and is equivalent to full proof. Again, if in a suit for rent due in 1754, the tenant proves the payment of his rent due in 1755, this is a probable presumption that the rent of 1754 was paid also. Again, such presumptions as are drawn from inadequate grounds are termed light or rash presumptions. Presumptions are also commonly divided into (1.) Presumptions *juris et de jure*, and (2.) Presumptions *juris tantum*, the former class being considered irrebuttable, and the latter rebuttable, by contrary evidence.

See also title EVIDENCE.

PRÊT, in French Law is a loan, and may be either (a.) *Prêt à usage*, corresponding to the *commodatum* of Roman Law (see that title), or (b.) *Prêt de consommation*, corresponding to the *mutuum* of Roman Law (see that title).

PRICKING FOR SHERIFFS used to be the method of electing the sheriffs of the different counties of England. Originally the sheriffs were chosen by the people in their folk-mote or county court; but these popular elections growing tumultuous, and the Crown also seeking to augment its influence in Parliament, they were put an end to by 9 Edw. 2, stat. 2, and it was enacted that the sheriffs should be assigned by the Chancellor, Treasurer, Barons of the Exchequer, and by the justices, and in the absence of the Chancellor, by the others, without him; and since the time of Henry VI. it became the custom for these, or some of these, distinguished and learned persons, to meet in the Exchequer Chamber on the morrow of All Souls yearly (which day was latterly altered to the morrow of St. Martin by the Act for abbreviating Michaelmas Term (24 Geo. 2, c. 48, s. 12), and then and there to propose three persons to the king (or queen), who afterwards appointed one of them to be the sheriff, and this was done by marking each name with the prick of a pin, and for that reason this particular election was generally termed pricking for sheriffs.

PRIMAGE. A small payment made to

PRIMAGE—continued.

the master of a vessel for his personal care and trouble, which he is to receive in addition to his wages or salary, to his own use, unless he has otherwise agreed with his employers. This payment is that intended in the phrase "with primage and average accustomed." It appears to be of very ancient date; and in the old books is sometimes called "hat money," and also "*la contribution des chausses, ou pot de vin du maitre.*" Abbot on Shipping by Shee, 404; Maude & Poll. Merch. Ship. 88. Kay's Law of Shipmasters.

PRIMATE OF ALL ENGLAND. An ecclesiastical title belonging to the Archbishop of Canterbury, who is styled "Primate of all England and Metropolitan." Anciently, indeed, he had primary jurisdiction, not only over all England, but in Ireland too; and it was from him that the Irish bishops received consecration; for Ireland had no other archbishop till the year 1152, and the Archbishop of Canterbury was then denominated "*Orbis Britannici Pontifex.*" But for a long period, up to a recent date, Ireland had four archbishops, one for each of the four provinces of Armagh, Dublin, Cashel, and Tuam, all of whom were distinguished by the title of primate; but by the recent stats. of 3 & 4 Will. 4, c. 87, and 4 & 5 Will. 4, c. 90, the number was diminished to two, the two others being reduced to the rank of bishops. And by a still more recent Act (32 & 33 Vict. c. 42), the entire English hierarchy in Ireland has been abolished. The Archbishop of York is sometimes styled Primate of England. See Burns' Eccl. Law, by Phillimore.

PRIMER FINE. On the levying of a fine when the writ of covenant was sued out, there was due to the king by ancient prerogative a sum of money called primer fine, being a noble for every five marks of land sued for. It was so called because there was another fine payable afterwards, which was termed the post fine.

See also title FINE.

PRIMER SEISIN (*prima seistina*). During the feudal tenures, when any of the king's tenants *in capite* died seised of lands or tenements, the Crown was entitled to receive of the heir, if he were of full age, a sum of money amounting to one whole year's profits of the lands, which was termed *primer seisin*, i.e., first possession. 1 Cruise, 31; 2 Inst. 134.

PRIMOGENITURE. The right of the eldest son to inherit his ancestor's estates to the exclusion of the younger sons; or, as the canon of descent has it, "that where

PRIMOGENITURE—continued.

there are two or more males, in equal degree, the oldest only shall inherit" (Litt. sec. 5). The law of primogeniture became generally established in England in the reign of Henry III., in which reign also the lineal descent of the Crown to the infant issue of an elder brother in preference to a younger brother of full age was established. The county of Kent is still an exception, theoretically at least, to the law of primogeniture.

See title DESCENTS.

PRINCIPAL AND ACCESSORY. A criminal offender is either a principal or an accessory; a principal is either the actor, i.e., the actual perpetrator of the crime, or else is present, aiding and abetting the fact to be done; an accessory is he who is not the chief actor in the offence, nor yet present at its performance, but is some way concerned therein, either before or after the fact committed. An accessory before the fact is he who, being absent at the time of the commission of a felony, procures, counsels, or commands the principal felon to commit it; as if several plan a theft, which one is to execute; or if a person incites a servant to embezzle the goods of his master. An accessory after the fact is one who, knowing a felony to have been committed, receives, harbours, relieves, comforts, or assists the principal or accessory before the fact with a view to his escape. 1 Hale, 613, 618.

See also titles ACCESSORIES; AIDERS AND ABETTORS.

PRINCIPAL AND AGENT. The English Law adopts the maxim, that what a man does through another person he does for himself (*qui facit per alium facit per se*), and as a rule (but subject to a few exceptions, chiefly statutory) what a man may do by himself he may also do by another acting for him; but the converse does not hold, that what he cannot do for himself, he cannot do for another, for infants and married women, although they cannot bind themselves, may be agents so as to bind the principal who employs them.

Agents are either general or special; but in either case the authority of the agent is confined by his instructions, whether particular or general, and the same rules of law apply to both.

These rules are principally the following:—

(1.) Where an agent contracts within the scope of his authority he binds his principal; and if without that scope, then he does not bind the latter;

(2.) Where an agent contracts as principal he is personally liable;

(3.) But in case (2), if the principal is

PRINCIPAL AND AGENT—continued.

known at the time of the contract to the other contracting party, who chooses there and then to *debit* the principal, the agent is not liable; and, on the other hand, if with the like knowledge he there and then *debts* the agent, the principal is not liable;

(4.) But if the principal is *unknown* at the time of the contract to the other contracting party, then, whether the agent represent himself or not as principal, the other contracting party may, upon discovering the principal, *debit* at his election either the principal or the agent;

(5.) Where, however, the principal is at fault in permitting his agent to act as apparent principal, and thereby the other contracting party is induced to contract with him, the true principal, if he should afterwards intervene, will take subject to all rights or equities, *e.g.*, by way of set-off, which the third party had against the apparent principal (*George v. Clagett*, 7 T. R. 359);

(6.) Where a person having no authority as an agent represents himself as agent, and in that self-assumed capacity enters into a contract, the other contracting party cannot charge the pretended principal either upon the contract or at all; but he may charge the assuming agent, not indeed, upon the express contract, but upon an implied contract or warranty that he had authority to make the contract, and in that way he will make such agent liable for damages (*Collen v. Wright*); and

(7.) An agent who contracts in writing should describe himself both in the body of the instrument and in his signature to it, as agent merely for his principal, naming the latter in both places, otherwise he may (in case of any ambiguity in the instrument) be held personally liable (*Humfrey v. Dale*, 7 El. & Bl. 286; El. Bl. & El. 1004); and he will certainly be personally liable in such a case if he names a fictitious principal.

Agency is determined by death of either principal or agent; nor does the English Law admit of that equitable extension of the Roman Law, whereby a stranger contracting with the agent in ignorance of the principal's death was protected, and might recover. *Smout v. Ibery*, 10 M. & W. 1; *Blades v. Free*, 9 B. & C. 157.

PRINCIPAL AND SURETY: See title SURETY.

PRISONS: See titles ESCAPE; RESCUE.

PRIVATE ACT OF PARLIAMENT. Is an Act affecting particular persons, as distinguished from a public Act, which concerns the whole nation. The statutes

PRIVATE ACT OF PARLIAMENT—cont.

of the realm are generally divided into public and private. The former being an universal rule that regards the community at large, and of which the Courts of Law are bound of themselves judicially to take notice; the latter being rather exceptions than rules, operating only upon particular persons and private concerns, and of these the judges need only take notice when expressly pleaded. Thus the statute 18 Eliz. c. 10, which prevents the master and fellows of any college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years or three lives, is a public Act, it being a rule prescribed to spiritual persons in general; but an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years, which is otherwise beyond a bishop's power, concerns only the parties, and is, therefore, a private Act. 4 Rep. 13 a.; *Ibid.* 76 a.

See also next title.

PRIVATE BILLS. All parliamentary bills which have for their object some particular or private interest are so termed, as distinguished from such as are for the benefit of the whole community, and which are thence termed public bills. The mode in which Parliament proceeds in the passing of public and private bills well illustrates their distinctive characters. In passing public bills, Parliament acts strictly in its legislative capacity; it originates the measures which appear for the public good; it conducts inquiries, when necessary, for its own information, and enacts laws according to its own wisdom and judgment. The forms in which its deliberations are conducted are established for its own convenience; and all its proceedings are independent of individual parties, who may petition indeed, and are sometimes heard by counsel; but who have no direct participation in the conduct of the business, nor immediate influence upon the judgment of Parliament. In passing private bills, the Parliament still exercises its legislative functions, but its proceedings partake also of a judicial character. The persons whose private interests are to be promoted appear as suitors; while those who apprehend injury are admitted as adverse parties in the suit. All the formalities of a Court of justice are maintained; various conditions are required to be observed, and their observance to be strictly proved; and if the parties do not sustain the bill in its progress by following every regulation and form prescribed, it is not forwarded by the House in which it is pending; and if they abandon it, and no

PRIVATE BILLS—*continued.*

other parties undertake its support, the bill is lost, however sensible the House may be of its value. The analogy which all these circumstances bear to the proceedings of a Court of justice is further supported by the payment of fees, which is required of every party supporting or opposing a private bill, or desiring or opposing any particular provisions. May's Parl. Pract. 626.

PRIVATE CHAPELS: See title PROPRIETARY CHAPELS.

PRIVATE WAY: See title WAY and title EASEMENT.

PRIVIES (from the Fr. *privé*, familiar, intimate, &c.). Persons between whom some connection exists, arising from some mutual contract entered into with each other; as between donor and donee, lessor and lessee; or else it signifies persons related by blood, as ancestor and heir, &c. And this connection which so arises or exists between persons is termed *privy*. The word "*privy*" is used with various adjuncts, in order to express the nature of the *privy* or connection which exists between persons. Thus, persons related by blood, as ancestor and heir for instance, are denominated *privies* in blood; those related to a party by mere right of representation, as executors or administrators of a deceased person, are denominated *privies* in representation, or in right; those connected with each other in respect of estate, as lessors and lessees, donors and donees, &c., are denominated *privies* in estate. So also those who are in any way related to the parties who levy a fine and claim under them, either by right of blood or otherwise, are denominated *privies* to a fine; and the connection or relationship which in all such cases arises or exists between the parties is termed *privy*; so that between lessors and lessees, who are termed *privies* in estate, there also exists *privy* of estate. 5 Cruise, 158; *Les Termes de la Ley*.

PRIVILEGE (*privilegium*). Sometimes used in law for a place which has some special immunity; and sometimes for an exemption from the rigour of the Common Law. It is either real or personal. A real privilege is that which is granted to a place, a personal privilege that which is granted to a person. An instance of the former kind is the power granted to the universities to have Courts of their own; an instance of the latter kind is the exemption of certain persons from being obliged to serve in certain offices, or to perform certain duties. Kitchen; Cowel.

See also title PARLIAMENT.

PRIVILEGED COMMUNICATION. In actions for libel or slander, one of the most common defences is that of privilege, or that the words spoken or written were a privileged communication. The chief grounds of privilege are the following:—

- (1.) That the defendant was the master of the plaintiff, and spoke the words to him while that relation was continuing (*Somerville v. Hawkins*, 10 C. B. 583);
- (2.) That the defendant spoke or wrote the words as part of a *character* which he was requested to give of the plaintiff (*Fountain v. Boodle*, 3 Q. B. 11);
- (3.) That the words were a fair comment upon an author or speaker (*Wace v. Walter*, L. R. 4 Q. B. 73); and
- (4.) That the defendant had a pecuniary interest (direct or indirect) in the business with reference to which the words were spoken, *Cozhead v. Rickards*, 2 C. B. 569.

PRIVILEGED DEBTS. Those debts which an executor may pay in preference to others; such as the funeral expenses, servants' wages, expenses of medical attendance incurred during the illness of the deceased, &c. Also, in bankruptcy proceedings under the Bankruptcy Act, 1883, the following classes of debts are privileged, *i.e.*, entitled to priority of payment:—

- (1.) Parochial, and other local rates;
- (2.) Assessed taxes;
- (3.) Land tax;
- (4.) Property or income tax up to the 5th of April preceding. In each of these cases to the extent of one year's arrears only;
- (5.) Wages or salaries of clerks or servants, not exceeding four months' arrears or £50; and
- (6.) Wages of labourers and workmen, not exceeding two months' arrears.

PRIVY OF CONTRACT. That connection or relationship which exists between two or more contracting parties is so termed. It is essential to the maintenance of an action on any contract that there should subsist a *privy* between the plaintiff and the defendant in respect of the matter sued on; and the absence of such *privy* is fatal to the action (*Baron v. Husband*, 4 B. & Ad. 611). But in some cases, where an action of contract will not lie for want of *privy*, an action of tort (in which *privy* is not an essential) will properly lie. *Gerhard v. Bates*, 2 El. & Bl. 476.

See title CONTRACTS.

PRIZE. Is booty seized on land or captured at sea in times of war. The

PRIZE—continued.

English Court of Admiralty has always had jurisdiction in the matter of naval captures; but until the stat. 3 & 4 Vict. c. 65, s. 22, it had no jurisdiction in the matter of land seizures, or booty. *Banda and Kiruze Booty Case*, Law Rep. 1 A. & E. 109.

Prize tribunals are a species of international tribunals, their sentences being conclusive evidence upon every matter within their respective jurisdictions (*Bolton v. Gladstone*, 5 East, 155); but nothing that rests on mere inference from these sentences is conclusive in the same manner (*Fisher v. Ogle*, 1 Camp. 418). The conclusive effect of these sentences appears to arise from the fact that they are not given in any litigation *inter partes* (the foreign state having no *locus standi* in the Courts) nor yet *ex parte*; but the sovereign state itself in which the Court is sitting is by means of its Court making an inquiry for itself, and adjudicating for itself only, and the sovereign state is answerable to the injured party (if any), who will either claim or recommit through his own government.

PROBATE (*probatio*). The copy of a will or testament made out in parchment under the seal formerly of the ordinary, and now of the Court of Probate, and usually delivered to the executor or administrator of the deceased, together with a certificate of the will's having been proved, is commonly called the probate. It is sometimes used for the act of proving a will. The meaning of proving a will may be thus explained. An executor, before he is permitted to take a probate of the will, is obliged to swear, formerly before the ordinary or his surrogate, and now before a registrar of the Court of Probate, that the writing contains the true last will and testament of the deceased as far as he knows or believes, and that he will truly perform the same by paying first the testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits of the deceased will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the registry of the Court at the time assigned by the Court, and render a just account thereof when lawfully required; and this is termed proving a will. Toller's Exe. 58.

See also title **PROVING A WILL**.

PROCEDENDO. A writ by which a cause which has been removed from an inferior to a superior Court by *certiorari* or otherwise, is sent down again to the same

PROCEDENDO—continued.

Court to be proceeded with there, after it has appeared that the defendant had not good cause for removing it. Cowell; *Les Termes de la Ley*.

PROCEDURE. This word is commonly opposed to the sum of legal principles constituting the substance of the law, and denotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies. It is also generally distinguished from the Law of Evidence. The procedure of different jurisdictions varies, that of the Courts of Common Law being in many respects different from the procedure in the Courts of Equity; but under the Judicature Act, 1873, and the rules made and to be made thereon, some attempt is made to ensure uniformity of procedure in these two hitherto separate jurisdictions. The procedure in criminal cases also differs from that in civil ones, and is not affected by the Judicature Act, or the rules thereon. For the particular rules of procedure, the reader must consult the particular titles contained in the Table of Contents under the heads Practice and Pleading.

PROCESS. This word is generally defined to be the means of compelling the defendant in an action to appear in Court. And when actions were commenced by original writ, instead of, as at present, by writ of summons, the method of compelling the defendant to appear was by what was termed original process, being founded on the original writ, and so called also to distinguish it from mesne or intermediate process, which was some writ or process which issued during the progress of the suit. The word "process," however, as now commonly understood, signifies those formal instruments called writs. The word "process" is in Common Law practice frequently applied to the writ of summons, which is the instrument now in use for commencing personal actions. The word "process," however, in its more comprehensive signification, includes not only the writ of summons, but all other writs which may be issued during the progress of an action. Those writs which are used to carry the judgments of the Courts into effect, and which are termed writs of execution, are also commonly denominated final process, because they usually issue at the end of a suit. Steph. on Plead. 21; Smith's Action at Law, 56; 1 Arch. Pract. 582.

PROCHIN AMY (*next friend*). As an infant cannot legally sue in his own name, the suit or action must be brought by his *prochein amy*, i.e., some friend who is will-

PROCEIN AMY—*continued.*

ing to take upon himself the trouble and responsibility. Co. Litt. 135 b., note; Cro. Car. 161.

See also title **NEXT FRIEND**.

PROCLAMATION. A notice publicly made of anything; or a public declaration of the king's will made to his subjects. It was the opinion of Lord Coke, that proclamations, when grounded on the laws of the realm, were of great force; and of Blackstone, that proclamations were binding on the subject when they did not contradict the laws of the land, or tend to establish new ones; and they appear, in fact, to be a proper mode, if not of signifying, at any rate of enforcing, the law, and, as such, to be a necessary part of the executive, in proper cases. They have been used at all times by all classes of sovereigns, as well those who regarded the constitution as those who disregarded it. The stat. 31 Hen. 8, c. 8, gave to the king's proclamations in ecclesiastical matters the force of law; and, similarly, Orders in Council made in virtue of any like enabling statute have the force of law.

PROCLAMATION OF A FINE. The notice or proclamation which was made after the engrossment of a fine, and which consisted in its being openly read in Court sixteen times: viz. four times in the term in which it was made, and four times in each of the three succeeding terms; which, however, was afterwards reduced to one reading in each term.

PRO CONFESSO. When a defendant in a suit in Chancery will not put in his answer to the plaintiff's bill, and the proper means have been resorted to, to compel him to do so, and yet he does it not, and will not do it, the plaintiff may proceed to have the bill taken against him *pro confesso* (i.e. as confessed), and to obtain a decree in the suit on the assumption that the defendant has confessed the truth of the bill: for by his not answering it, and remaining silent, it is assumed, reasonably enough, that he confesses the truth of its contents.

PROCTOR (*procurator*). An officer of the Ecclesiastical Courts, while these existed, and now of the Court of Probate, whose duties correspond with those of an attorney in the Common Law Courts; and in fact all such attorneys may, and commonly do, now act as proctors in the Court of Probate.

PROCURATION (*procuratio*). Indorsing a bill of exchange by procuration, is doing it as proxy for or by authority of another. Also, many contracts are entered into *per*

PROCURATION—*continued.*

proc., as it is called; in which case the agent should describe himself as such both in the body of the document and in his signature to it, otherwise he may be incurring a personal liability upon it.

See title **PRINCIPAL AND AGENT**.

PROCURATOR. In its general signification means any one who has received a charge, duty, or trust for another. Thus the proxies of the Lords in Parliament are in our old books called *procuratores*; so also a vicar or lieutenant was so called, and even the bishops were sometimes called *procuratores ecclesiarum*. From this term came the word "proctor," meaning one who acted for another in the Ecclesiastical Courts, the same as an attorney does for his client in the Common Law Courts. The word "procurator" was also used for him who gathered the profits of a benefice for another man, and the word "procuracy" for the writing or instrument which authorized the procurator to act. Cowel; *Les Termes de la Ley*.

PROCUREUR DU ROI. In French Law is a public prosecutor, with whom rests the initiation of all criminal proceedings. In the exercise of his office (which appears to include the apprehension of offenders), he is entitled to call to his assistance the public force (*posse comitatus*); and the officers of police are auxiliary to him.

PROCUREUR - GÉNÉRAL, ou IMPÉRIAL. In French Law is an officer of the Imperial Court, who either personally, or by his deputy, prosecutes every one who is accused of a crime according to the forms of French Law. His functions appear to be confined to preparing the case for trial at the assizes, assisting in that trial, demanding the sentence in case of a conviction, and being present at the delivery of the sentence. He has a general superintendence over the officers of police and of the *juges d'instruction*, and he requires from the *procureur du roi* a general report once in every three months.

PROPERT IN CURIA (*he produces in Court*): See title **OYER OF DEEDS AND RECORDS**.

PROFITS À PRENDRE. Are rights of taking some portion of the substance or produce of lands, in which respect they are distinguished from *easements*, which are privileges without profit (see title **EASEMENTS**). They are to all intents and purposes mere rights of common, and their varieties are specified under that title.

PROHIBITION. A writ issuing properly out of the Court of King's Bench,

PROHIBITION—*continued.*

being the king's prerogative writ; but for the furtherance of justice it may also be had in some cases out of the Courts of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. No such prohibition will issue after sentence unless the want of jurisdiction below appears on the face of the proceedings. *Buggin v. Bennet*, 4 Burr. 20, 35.

In early times, the chief use of prohibitions was to restrain the Ecclesiastical Courts from interfering in matters which were properly subject to the jurisdiction of the Courts of Common Law, whence also numerous statutes were passed in aid of the Common Law (see titles *ARTICULI CLERI*; *CLARENDON, CONSTITUTIONS OF*). And the clergy used to complain, notably in the reign of James I. during the primacy of Archbishop Bancroft, that the Common Law Courts extended their interference with the spiritual Courts by means of their prohibitions too far (see *Case of Prohibitions*, 12 Rep. 59). But in more modern times the uses of writs of prohibition have been chiefly the following:—

- (1.) To commissioners, justices, and inferior Courts generally, whether civil or criminal, for assuming unwarranted jurisdiction;
- (2.) To Courts of Appeal, not excepting even the Judicial Committee of the Privy Council. *Darby v. Cozens*, 1 T. R. 552; *Ex parte Smyth*, 3 A. & E. 719.

But, *semble*, no prohibition will issue to restrain the Lord Mayor's Court, this being a consequence of the words of s. 15 of the Mayor's Court Procedure Act, 1857, which provide that all objections to the jurisdiction shall be taken by plea only.

The Court of Chancery can properly grant a prohibition (as distinguished from an injunction) during vacation only, and not during term.

PRO INDIVISO (*as undivided*). The joint occupation or possession of lands; thus lands held by co-parceners are held *pro indiviso*, that is, they are held undividedly, neither party being entitled to any specific portions of the land so held, but both or all having a joint interest in the undivided whole. Cowel.

PROMISE. In law is either express or implied. Express, when founded upon the express contract or declaration of the party promising; implied, when the promise is

PROMISE—*continued.*

inferred from his acts, conduct, or peculiar position. Thus, the law will always infer a promise by a debtor to pay a debt due to his creditor; and in an action against the debtor for recovery of the debt, such promise must be alleged in the declaration, although it need not be specifically proved.

See also title *ASSUMPSIT*.

PROMISSORY NOTE. A written instrument by which one person engages or promises to pay a certain sum of money to another. It in many respects resembles a bill of exchange; the following is an ordinary form of a promissory note:—

£100 Os. 0d.

London, 1st March, 1874.

On demand, I promise to pay to James Williams, or bearer, one hundred pounds, value received.

JOHN ANDERSON.

A promissory note, of course, varies from the above form according to circumstances; thus a party frequently promises to pay at a certain period after the date of it instead of on demand, and then it would run thus: "Three months (as the case may be) after date, I promise," &c.

See also title *BILL OF EXCHANGE*.

PROMOTERS. Those persons who in popular and penal actions prosecute offenders in their own name and in that of the king's, and are thereby entitled to a part of the fine or penalty inflicted on the offender as a reward for so prosecuting. The term is also, and now almost exclusively, applied to a party who puts in motion an ecclesiastical tribunal for the purpose of correcting the manners of any person who has violated the laws ecclesiastical, and, taking such a course, he is said to "promote the office of the judge" (see *Taylor v. Morley*, 1 Curt. 470). It would appear that the office of the judge ought not to be promoted in a suit by more than one person, excepting in the case of churchwardens (*per* Sir H. Jenner, 2 Curt. 403). The word "promoters" is also used to denote a number of persons who project and endeavour to float a public undertaking, e.g., promoters of railway companies.

PROPERTY (*proprietas*). A word of almost infinite extent, including every species of acquisition which a man may have an interest in. Thus the terms lands, goods, chattels, effects, and, indeed, almost every term which represents an object in which a person may acquire an interest or a right, are included in the word "property." *Doe d. Morgan v. Morgan*, 6 B. & C. 512.

PROPOUNDER OF A WILL. He by whom it is brought forward, and who seeks to obtain for it the probate formerly of the ordinary or of the Prerogative Court, and now of the Court of Probate. This is generally the executor; but if any testamentary paper be left in the possession of, or materially benefits, any other person, it may be propounded by such person. *Wood and Others v. Goodlake; Helps and Others*, 2 Curt. 84, 95.

PROPRIETARY CHAPELS. There are four principal sorts of chapels: 1st. Private chapels; 2nd. Chapels of ease; 3rd. Free chapels; and 4th. Proprietary chapels. 1st. Private chapels are those which noblemen or any worthy and religious persons have, at their own expense, built in or near their own houses, for them and their families to perform religious duties in. These, and their ornaments, are maintained by those to whom they belong, and chaplains are provided for them by themselves with suitable pensions. The minister, by his appointment, gains no freehold interest, and may be dismissed whenever the party who appointed him thinks fit (4 B. & C. 573; *Rog. Eccl. Law*, 149). 2nd. Chapels of ease are such as are built within the precincts of a parish and belong to the parish church and the parson of it (2 Roll. Abr. 840, l. 51, 341, l. 2). It is a mere oratory for the parishioners in prayers and preaching (sacraments and burials being received and performed at the mother church), and commonly the curate is removable at the will of the parochial minister (*Gibs*. 209; 1 *Burn's Eccl. Law*, 299). 3rd. Free chapels are such as are of royal foundation or founded by subjects by the licence or grant of the Crown. Hence they are usually found upon the manors and ancient demesnes of the Crown, where they were built whilst in the king's hands for the use of himself and his retinue when he came to reside there (*Godol. Ab.* 146). 4th. Proprietary chapels are such as have been built within time of memory; and these are usually assessed to the rates as other buildings and dissenting chapels are. These chapels, unless when they are enabled by statute, can exercise no parochial rights, and are described by Sir John Nicholl to be "anomalies unknown to the constitution and to the ecclesiastical establishment of the Church of England." 2 Hag. 46.

PROPRIETATE PROBANDA. A writ which used to be directed to the sheriff, requiring him to inquire by inquest whether goods distrained were the property of the plaintiff, or of the person claiming them. This writ issued when to a writ of replevin the sheriff returned as his rea-

PROPRIETATE PROBANDA—*could*

son for not executing it, that the distrainor, or other person, claimed a property in the goods distrained (2 Arch. Pract. 827). The object of this writ is now obtained by means of a summons to interplead.

PROPRIÉTÉ. In French Law, is the right of enjoying and of disposing of things in the most absolute manner, subject only to the laws.

PRO RATÂ (*in proportion; at a certain rate*). As, under certain circumstances, the payment of freight is regulated according to the portion of the voyage performed, *pro ratâ itineris peracti*. Abbot on Shipping, by Shee, 438, *et seq.*; 1 M. & S. 453; 5 Taunt. 512; 10 East. 378, 526. See also the phrase used in 2 Williams's Exors. 1459.

PROROGATION OF PARLIAMENT: See title PARLIAMENT.

PROTECTION, WRIT OF. A prerogative writ which the king may grant to privilege any person in his service from arrest during a year and a day; this prerogative, however, is seldom exercised; it was formerly the subject of much abuse, whence the frequent complaints regarding it in the early constitutional period.

PROTECTOR. By a 32 of the stat. 3 & 4 Will. 4, c. 74, power is given to any settlor to appoint any person or persons, not exceeding three, the protector of the settlement, and also to perpetuate that protectorship; and by a 33 of the same Act, if any protector is a lunatic, idiot, or of unsound mind, the person for the time being entrusted by the royal sign manual with the care and custody of the persons and estates of such persons (being usually the Lord Chancellor) is constituted protector in the place of such lunatic, idiot, or person of unsound mind; or if the protector is a convicted felon, or an infant, or it is uncertain whether he is living or dead, and generally in the absence of a protector for other causes, there being a subsisting prior estate, the Court of Chancery is constituted protector in his stead. However, by a 22 of the Act, it is enacted that if at the time of a subsisting tenancy in tail under a settlement, there is also subsisting under the same settlement in the same lands, any estate for years determinable on a life or lives, or any greater estate (not being an estate for years simply) prior to the estate tail, the owner of such prior estate (or if there be more than one such, then the owner of the first of them, being otherwise qualified) shall be the protector of the settlement, notwith-

PROTECTOR—continued.

standing such owner may have wholly alienated his estate, or have incumbered the same; and by s. 23, each of two or more persons, co-owners of such prior estate, is sole protector in the proportion of his share; and by s. 24, a married woman being owner of such prior estate, if settled to her separate use, is sole protector, and if not so settled, is protector together with her husband. But by ss. 27 and 31, the following persons, as such, are not to be capable of being protectors, viz., dowresses, bare trustees, heirs, executors, administrators, or assigns: but a tenant by the curtesy may be protector (s. 22), and also a bare trustee under a settlement dated on or before the 31st of December, 1833.

The protector is, in the exercise of his own unlimited discretion, to accord or to withhold his consent to any disposition of an actual tenant in tail; but once he has accorded the same, he cannot afterwards recall it, s. 44. The protector, by s. 42, is to give his consent either in the deed of disposition, or by any deed prior to or contemporaneous with the deed of disposition, the distinct deed (if any such is used) requiring to be inrolled in the Court of Chancery either with or before the inrollment of the deed of disposition. The Lord Chancellor or Court of Chancery may signify his or its consent by *order*.

PROTEST. In its most general and enlarged sense signifies an open declaration or affirmation. Thus, when in the House of Lords any vote passes contrary to the sentiments of any of its members, such members may, by leave of the House, enter their dissent on the journals of the House, with the reasons of such dissent, which is usually styled their protest. So also the term "protest," as applied to foreign bills of exchange, signifies a solemn declaration by the notary that the bill has been presented for acceptance or payment and dishonoured. So also amongst mariners, a declaration made on oath before a magistrate or notary public in any distant port of the damage likely to ensue from a ship's delay is termed a protest.

PROTESTATION. A particular formula which was used in pleading was so termed; the nature of it may be thus explained:—It is frequently expedient for a party to plead in such a manner as to avoid any implied admission of a fact which cannot with propriety or safety be positively affirmed or denied; and this might be done by the party interposing an oblique allegation or denial of some fact, protesting that such a matter did or did not exist, and at the same time avoiding a

PROTESTATION—continued.

direct affirmation or denial; and this was technically termed a protestation. This, however, by a late rule of Court (Hil. T. 4 Will. 4) is disallowed. In a demurrer to a bill in the Court of Chancery, the form begins with a protestation in this manner: "This defendant by *protestation* not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur, &c." See *Hunter's Suit in Equity*, App. p. 275.

PROVISIONAL ASSIGNEE. Was an assignee to whom the property of a bankrupt was assigned until the regular or permanent assignees were appointed by the creditors. But the 1 & 2 Will. 4, c. 56, s. 22, and 5 & 6 Vict. c. 122, s. 48, having enacted that until assignees should be chosen by the creditors of each bankrupt, the official assignee to be appointed to act with the creditors' assignees should be enabled to act, and should be deemed to be to all intents and purposes a sole assignee of each bankrupt's estate and effects, provisional assignees ceased to be any longer necessary, the official assignees acting, in fact, as such provisional assignees in all cases. The like simplification of the bankruptcy law is preserved under the Act of 1869, under which the registrar of the Court is the official trustee until the Court or the creditors have appointed a particular trustee of the bankrupt.

PROVISIONS. The nominations to benefices by the pope were so called, and those who were so nominated were termed provisors. Various statutes were passed in the reign of Edward III. forbidding all ecclesiastical persons from purchasing these provisions: see in particular the stats. 25 Edw. 3, st. 6, and 27 Edw. 3, st. 1, which are pre-eminently called the Statutes of Provisors.

See also title **PREMUNIRE**.

PROVISO. A condition or provision which is inserted in deeds, and on the performance or non-performance of which the validity of the deed frequently depends; it usually begins with the word "provided." Thus, in leases there is usually a proviso that if the rent be unpaid for the space of twenty-one days after the day appointed for the payment of it, then it shall be lawful for the lessor to enter into possession of the premises (4 Cruise, 376). So in mortgage deeds, that part which provides that on payment of the mortgage-money and interest and costs by the mortgagor, the mortgagee shall re-convey the estate to the mortgagor, is termed the pro-

PROVISO—*continued.*

viso for redemption, because it is by virtue of that proviso that the mortgagor is empowered to redeem his estate.

See also title **PROVISO, TRIAL BY.**

PROVISORS : *See title* **PROVISIONS.**

PROVISO, TRIAL BY. In all cases in which the plaintiff, after issue joined, does not proceed to trial, when by the course and practice of the Court he might have done so, the defendant may, if he wishes, give the plaintiff notice of trial, and proceed to trial as in ordinary cases; this is termed a trial by proviso. It is so called because, in the *distringas* to the sheriff there is a proviso that *provided* two writs shall come to his hands he shall execute one of them only (2 Arch. Prac. 1492-3). But as this mode of proceeding is tedious and expensive, the defendant in ordinary cases more usually takes proceedings under the C. L. P. Act, 1852, s. 101, to compel the plaintiff to proceed to trial.

PUBLIC ACT OF PARLIAMENT is an Act which concerns the whole community, and of which the Courts of Law are bound judicially to take notice. *See for distinction between a Public and Private Act, title* **PRIVATE ACT OF PARLIAMENT.** *See also title* **PRIVATE BILLS.**

PUBLICATION. This word, as applied to the depositions of witnesses in a suit in Chancery, signified the right which was exercised by the clerks in Court, or the examiner, of openly shewing the depositions as taken at the examination of such witnesses. There was a limited time only, namely, eight weeks after issue joined, within which this public shewing of the depositions was permitted to be made; after which time publication was said to have passed. But the Court would enlarge the time for publication, and latterly even upon summons at chambers. The closing of the time for taking evidence under the modern practice is the same thing as the passing of publication under the former.

PUBLIC COMPANY : *See title* **JOINT STOCK COMPANIES.**

PUBLIC HEALTH : *See title* **HEALTH, PUBLIC.**

PUBLISH. The publishing of a will by a testator signified the declaration which he made (usually at the time of signing it) in the presence of a proper number of witnesses, that it was his last will and testament. But under the new Wills Act, 1 Vict. c. 26, no such publication is now necessary to the validity of a will, s. 13.

PUIS DARREIN CONTINUANCE (*since the last adjournment, or continuance*).

By the ancient practice, when adjournments of the proceedings took place for certain purposes from one day or one term to another, there was always an entry made on the record expressing the ground of the adjournment, and appointing the parties to re-appear at a given day, which entries were called continuances. In the intervals between such continuances and the day appointed the parties were of course out of Court, and consequently not in a situation to plead. But it sometimes happened, that after a plea had been pleaded, and while the parties were out of Court in consequence of such a continuance, some new matter of defence arose which did not exist before the last continuance, and which the defendant consequently had had no opportunity of pleading before that time. This new defence he was therefore entitled, at the day given for his re-appearance, to plead, as a matter that had happened after or since such last continuance (*puis darrein continuance*); and it was, therefore, termed a plea *puis darrein continuance*. And under the C. L. P. Act, 1852, s. 69, in cases in which a plea *puis darrein continuance* has heretofore been pleadable in *banc* or at *nisi prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; but no such plea shall be allowed unless accompanied with an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a judge shall otherwise order. 2 Arch. Pr. 920.

See title **CONTINUANCE.**

PUISNE (Fr. *puiné*, younger, subordinate). Thus all the judges, excepting the chiefs, are termed *puisne* judges; that is, they are subordinate to their respective chiefs. As to *mulier puisne*, *see title* **EIGNÉ.**

PUISSANCE PATERNELLE. In French Law the male parent has the following rights over the person of his child:—(1.) If child is under sixteen years of age he may procure him to be imprisoned for one month or under; (2.) If child is over sixteen and under twenty-one he may procure an imprisonment for six months or under, with power in each case to procure a second period of imprisonment. The female parent, being a widow, may, with the approval of the two nearest relations on the father's side, do the like.

The parent enjoys also the following rights of property over his child, viz., a right to take the income until the child attains the age of eighteen years, subject to maintaining the child and educating him in a suitable manner.

PUR AUTRE VIE (*for the life of another*).

An estate *pur autre vie* is an estate which endures only for the life of some particular person. Thus, if A. lease lands to B. to hold and enjoy them for or during the life of C., B. is said to have an estate *pur autre vie*—that is, during the life of another, viz., the life of C.; and B. is also then called, in respect of his interest in such lands, a tenant *pur autre vie*, and C., for or during whose life B. holds his lands, is termed the *cestui que vie*.

See also title **ESTATES**.

PURCHASE.

The word "purchase" is used in law in contradistinction to descent: and is any other mode of acquiring real property than by the common course of inheritance. So that the word is not merely used in its popular sense, viz., that of buying for a sum of money, but implies any mode of acquiring property except by descent. Thus, if a person acquires real property by gift, grant, or by devise, or by any other mode (excepting descent), and which does not even subject him to the payment of any sum of money for such property, he is still in legal language said to acquire such property by purchase. The difference between the acquisition of an estate by descent and by purchase consists principally in two points: (1.) That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general. (2.) That an estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will. 2 Cruise, 451, 452.

PURPRESTURE, or PURPRESTER.

A word derived from the Fr. *pourpris*, which signifies to take from another and appropriate to oneself; hence a purpresture, in a general sense, signifies any such wrong done by one man to another. Purpresture in a forest signified any encroachment upon the king's forest, whether by building, inclosing, or using any liberty without a lawful warrant to do so. *Les Termes de la Ley*.

PURVIEW.

The purview of an Act of Parliament is that part of it which begins with the words, "Be it enacted," &c. Cowel.

PUTATIVE FATHER.

The alleged or reputed father of an illegitimate child is so called.

See also titles **AFFILIATION**; **BASTARDY**.

PUTTING IN SUIT.

As applied to a bond, or any other legal instrument, signifies bringing an action upon it, or making it the subject of an action. Thus in 43 Geo. 3, c. 99, it is enacted, that the collec-

PUTTING IN SUIT—*continued*.

tors appointed by the commissioners of taxes shall give security by a joint and several bond, with two sureties, &c., "provided always that no such bond shall be put in suit (i.e., be made the subject of any action) against any surety or sureties for any deficiency other than what shall remain unsatisfied after the sale" of the defaulting collector's goods.

Q.**QUALIFIED FEE:** See title **BASE FEE**.**QUAMDIU SE BENE GESSERIT** (*as long as he conducts himself well*).

A clause frequently inserted in the grant of offices, &c., by letters patent, and signifying that the party shall hold the same as long as he behaves himself well (*quamdiu se bene gesserit*) (Co. 4 Inst. 117; Cowel). Under the Act of Settlement (12 & 13 Will. 3, c. 2), the judges are made to hold office upon the like terms, namely, *quamdiu se bene gesserint*.

QUANDO ACCIDERINT (*when they may happen*).

Judgment of assets *quando acciderint* is a judgment which is sometimes signed against an executor, and which empowers the party so signing it to have the benefit of assets which may at any time afterwards come to the hands of the executor, or whenever they may happen (2 Arch. Pract. 1229). The plaintiff, having obtained a judgment of this sort, may afterwards, upon the assets having come to the defendant's hands, proceed against him by *sci. fa.* to obtain payment of his debt.

QUANTUM MERUIT (*as much as he deserved*).

These words are thus explained by Blackstone: "If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved; and if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit* or promise; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved;" and this action on the case is thence termed an action of *assumpsit* on a *quantum meruit*, that is, an action for breach of my promise to pay him as much as he deserves. But this *assumpsit* may be excluded by special agreement. (See *Cutler v. Powell*, 2 Sm. L. O. 1, and notes thereto). There is also an action of *assumpsit* on a *quantum valebat* (i.e., as much as it was worth), which is very similar to the former, being only where one takes up goods or wares of a tradesman without expressly

QUANTUM MERUIT—*continued.*

agreeing for the price. There, the law concludes that both parties did intentionally agree that the real value of the goods should be paid, and therefore an action may be brought for the breach of the implied promise to pay as much for the goods as they were worth.

QUANTUM VALEBAT: See title **QUANTUM MERUIT**.

QUARE CLAUSUM FREGIT (*wherefore he broke the close*). That species of the action of trespass which has for its object the recovery of damages for an unlawful entry upon another's land is termed an action of trespass *quare clausum fregit*; "breaking a close" being the technical expression for an unlawful entry upon land. The language of the declaration in this form of action is "that the defendant with force of arms broke and entered the close" of the plaintiff.

The foundation of this action is *possession* in the plaintiff, which must be actual, not merely constructive, possession; in the action of trespass to personal property, on the other hand, i.e., the action of trespass *de bonis asportatis*, although the foundation of the action is also possession, yet that possession may be either actual or *constructive*.

QUARE EJECIT INFRA TERMIMUM.

A writ which lay for a lessee when he was cast out or ejected from his farm before the expiration of his term, against the lessor or feoffee who so ejected him, to recover the residue of his term, and also damages for being so ejected. Cowel; *Les Termes de la Ley*.

QUARE IMPEDIT (*why, or wherefore, he hinders*). The action of *Quare impedit* was the remedy by which a party whose right to a benefice was obstructed recovered the presentation, and was the form of action constantly adopted to try a disputed title to an advowson. But by the C. L. P. Act, 1860, s. 26, no *Quare impedit* shall be brought after the commencement of that Act, but the action may be commenced by the ordinary writ of summons, with an indorsement thereon that the plaintiff intends to declare in *Quare impedit*. 1 Arch. Prac. 2.

QUARREL (*querela, à querendo*). This word is said to extend not only to real and personal actions, but also to the causes of actions and suits; so that by the release of all quarrels, not only actions pending but also causes of action and suit are released; and quarrels, controversies, and debates are in law considered to have one and the same signification. Co. Litt. 8, 153; *Les Termes de la Ley*.

QUARTER SESSIONS: See title **SESSION**.

QUASH (*casum facere*). To make void, to cancel, to abate. Thus, to quash a plea, an order of sessions, &c., is to annul or cancel the same.

QUASI-CONTRACT. An implied contract. Maine, in his *Ancient Law*, objects that the implied contracts of English Law are different from the *quasi-contracts* of Roman Law, but his opinion is not correct; for the particular instances given in Just. iii. 27 (28), of *quasi-contracts* in Roman Law are all of them good as implied contracts in English Law. It is true, however, that there are in Roman Law a species of contracts, not being *quasi-contracts*, which are called implied contracts (*tacite convenire*), e.g., in Dig. ii. 14. 4, where a landlord's right to take the furniture of his tenant in distress for rent is instanced as an implied contract.

QUE ESTATE. A term used in pleading, the nature of which may be thus explained. Formerly it was necessary, when there was occasion to plead a prescriptive right to any easement, or profit, or benefit arising out of land (as, for example, a prescriptive right of way or common), to allege *seisin* in fee of the land in respect of which the right was claimed, and then to allege that the plaintiff AND all those whose estate he had in the land, had from time immemorial exercised the right in question, and this was termed prescribing in a *que estate*, from the word *AND* (*que*).

QUEEN ANNE'S BOUNTY. This is a perpetual fund for the augmentation of poor livings in the Church of England, arising out of the revenue of the first fruits and tenths which Queen Anne (by charter subsequently confirmed by stat. 2 & 3 Anne, c. 11) vested in trustees for ever for that purpose. Those "first fruits" and "tenths," having been (as explained under their own titles) originally a tax enforced by the popes from the richer English clergy, formed subsequently to the Reformation a branch of the revenue of the Crown; and, subject to various alterations in amount, they so remained until the reign of Queen Anne, who did not remit them unconditionally, but applied these superfluities of the larger benefices to make up the deficiencies of the smaller. This fund still exists, and is regulated by a variety of statutes, of which the principal are,—2 & 3 Anne c. 20, 55 Geo. 3, c. 147, 16 & 17 Vict. c. 70, and 28 & 29 Vict. c. 69.

See also title **ECCLESIASTICAL COMMISSIONERS**.

QUEEN'S ADVOCATE. An advocate of the Civil Law Bar appointed by the Crown to maintain its interests and to advise it in all matters in which the learning of the Civil Law is involved. Those matters include important questions of international law, upon which (as in framing treaties with foreign nations) the counsel of the Queen's Advocate is frequently taken by the government. In the legal profession this officer holds a distinguished place. He now ranks next in dignity to the Attorney and Solicitor-Generals, and formerly, indeed, the Queen's Advocate took precedence even of them. The Queen's Advocate used to practise in the Ecclesiastical Courts at Doctors' Commons, and at the present day confines his practice, as a rule, to the Courts of Probate, Divorce, and Admiralty.

QUEEN'S BENCH, COURT OF : See title KING'S BENCH.

QUEEN'S BENCH PRISON. Sometimes called the Prison of the Marshalsea of the Court of Queen's Bench, was a prison for debtors and for persons confined under the sentence, or charged with the contempt of Her Majesty's Court of Queen's Bench. This prison, the Fleet, and the Marshalsea Prisons, were, by the 5 Vict. c. 22, consolidated under the title of the Queen's Prison, which latter is by the above Act appointed to receive all the prisoners formerly distributed among the three. 6 Jur. 254.

QUERELA. An action preferred in any Court of justice in which the plaintiff was *querens*, or complainant, and his brief, complaint, or declaration was *querela*, whence the use of the word "quarrel" in law. *Quietus esse à querela* sometimes meant to be exempted from the customary fees paid to the king or lord of a Court for liberty to prefer such an action; but more commonly it meant to be freed from the fines or amercements which would otherwise have been imposed upon the exempted person for trespasses and such like offences. Cowel.

QUI TAM, Suing. Prosecuting a popular action for the purpose of recovering the penalty is called suing *qui tam*, because the prosecutor or informer sues as well for the Crown as he does for himself.

See title QUI TAM ACTIONS.

QUI TAM ACTIONS. Those kinds of popular actions in which one part of the penalty recovered is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor. It is called a *qui tam* action, because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur*" (i.e., who sues as well for our

QUI TAM ACTIONS—continued.

lord the king as for himself). The case of *Thomas v. Sorrell* (Vaughan), which is otherwise famous as having first stated the true nature and limits of the king's dispensing power, was a *qui tam* action.

QUIA EMPTORES (because purchasers). The stat. 18 Edw. 1, c. 1, is so called. This statute took from the tenants of common lords the feudal liberty they claimed of disposing of part of their lands to hold of themselves, and instead of it gave them a general liberty to sell all or any part, to hold of the next superior lord, which they could not have done before without consent (*Wright's Ten.* 161; 4 Cruise, 6). The effect of the statute was twofold—(1.) To facilitate the alienation of fee simple estates; and (2.) To put an end to the creation of any new manors, i.e., tenancies in fee simple of a subject.

See title ALIENATION.

QUID PRO QUO (what for what). Used in law for the giving one valuable thing for another. It is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding. Cowel.

QUIETUS. A word which was commonly used by the clerk of the pipe and auditors in the Exchequer in their acquittances or discharges given to accountants, signifying to be freed, acquitted, or discharged. Cowel.

See also title CROWN DEBTS.

QUIT CLAIM. The release or acquitting of one man by another, in respect of any action that he has or might have against him, also acquitting or giving up one's claim or title. Bracton, b. 5, tract. 5, c. 9, num. 6; *Les Termes de la Ley*.

QUIT RENT (*quietus redditus*). Certain established rents of the freeholders and ancient copyholders of manors are denominated quit rents, *quieti redditus*, because thereby the tenant goes quit and free of all other services. 3 Cruise, 314.

See also title RENTS.

QUO MINUS. A writ upon which all proceedings in the Court of Exchequer were formerly grounded, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens exstitit, by which* he was the less able to pay the king his debt or rent. It was also a writ which formerly lay for one who had a grant of house-bote and hay-bote in another man's woods against the grantor for making such waste as interfered with the grantee's enjoyment of his grant. Cowel.

QUO WARRANTO. A writ which lies for the king against any one who claims or usurps any office, franchise, or liberty, to inquire *by what authority* he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it, being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse (Finch's L. 322). An information in the nature of a *quo warranto* may also be laid under the stat. 9 Anne, c. 20, but it is in the discretion of the Court to grant it or not (*Rex v. Trevenner*, 2 B. & A. 479). The information will generally be granted where the right in dispute depends upon a doubtful point of law, in order to its being finally determined (*Rex v. Carter*, Loft. 516). And generally a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office is of a public nature, and a substantive office, not merely a function discharged at the will or pleasure of others (see *Darley v. Reg.* (in error), 12 Cl. & F. 520), which was a case regarding the office of treasurer of the public money of the county of the city of Dublin.

QUO WARRANTO, CASE OF. The case which is pre-eminently so called was a case brought in 1681 by the Attorney-General, on behalf of the king against the corporation of the City of London, alleging breaches of trust in the officers of the corporation and seditious opposition to the Crown, and requiring the City to shew the tenure of its liberties, with a view to the justification of its proceedings. The offences alleged were,—

- (1.) That the City had imposed taxes without authority; and
- (2.) That the City had concocted seditious petitions to the king.

Judgment was given for the Crown, and against the City; and the corporation not submitting within the time limited for their so doing, their liberties were taken from them, and their charter was forfeited. These liberties, together with their charter, were not restored until 1688, when James II., under the immediate fear of his own expulsion, restored them.

QUOAD (as to, concerning, &c.) A prohibition *quoad* is a prohibition as to certain things amongst others. Thus, where a party was complained against in the Ecclesiastical Court for matters cognisable in the temporal Courts, a prohibition *quoad* these matters issued, i.e., *as to such matters* the party was prohibited prosecuting his

QUOAD—continued.

suit in the Ecclesiastical Court. The word is also frequently applied to other matters than to prohibitions. See 2 Roll. Abr. 315, b. 10; Vin. Abr. tit. "Prohib." E. a. 7.

QUOD EI DEFORCEAT. A writ that lay for a tenant in tail, tenant in dower, or tenant for life, who had lost their lands by default, against him who recovered them, or against his heir. Reg. Orig. 171.

QUOD PERMITTAT. A writ that lay for the heir of him who was disseised of his common of pasture against the heir of the deceased disseisor. Cowel.

QUOD PERMITTAT PROSTERNEERE. A writ which lay against any person who erected a building, though on his own ground, so near to the house of another that it overhung it, and became a nuisance to it. Tomlins.

QUORUM (of whom). Among the justices of the peace appointed by the king's commission, there were some who were more eminent for their skill and discretion than others, one, or some of whom, on special occasions the commission expressly required should be present, and without whose presence the others could not act; and who were thence termed justices of the quorum, from the language of the commission, which ran thus: "*quorum aliquem vestrum* A. B., C. D., &c., *unum esse volumus*" (i.e., of whom we wish some one of you, A. B., C. D., &c., to be present). The word is used in a similar sense in the following passage: "By charter 2 Edw. 4, the mayor, recorder, and aldermen that have been mayors, shall be conservators of the peace within the city; and they, or four of them, *quorum* the mayor to be one, shall be justices of *oyer and terminer* there." Com. Dig. tit. London (C.), Mayor.

QUOUSQUE (until). Thus a seizure *quousque* by the lord of a manor on default of the heir coming in to be admitted, means a seizure until the heir so comes in; the lord being entitled to do this after three proclamations made at three consecutive Courts (Watkins on Copyholds, 230, tit. "Admission;" Carth. 41: 1 Lev. 63; 3 T. R. 162). A prohibition *quousque* is a prohibition by which something is forbidden or prohibited until a certain time. Thus, if in trying temporal incidents in the Ecclesiastical Courts, they rejected a mode of proof sufficient at Common Law, they might have been prohibited *quousque* (until) they submitted to a legal mode of trial. Yelv. 92.

R.

RACHAT. In French Law is the right of re-purchase which the vendor in English Law may reserve to himself. It is also called *rémeré* (see that title).

RACK-RENT. A rent of the full annual value of the tenement, or near it.

RAILWAY COMPANIES: See title **JOINT STOCK COMPANIES.**

RAISING A USE. Creating, establishing, or calling a use into existence. Thus, if a man conveyed land to another in fee, without any consideration, Equity would presume that he meant it to the use of himself, and would therefore raise an implied use for his benefit. See title **USE**; also **Saunders on Uses and Trusts**, c. 1, s. 9, 5th edit.; 1 *Cru. Dig.* 412.

RANSOM. In law this word is frequently used to signify a sum of money paid for the pardoning of some great offence: and the distinction made between a *ransom* and an *amercement* is, that a ransom is the redemption of a corporal punishment, whereas an amercement is a fine by way of penalty for an offence committed. *Litt.* 127; *Cowel.*

RAPE. A criminal offence, consisting in the penetration of a female's parts against her will or without her consent. It is punishable with penal servitude for life, or for any period not under five years, or with imprisonment not exceeding two years, and with or without hard labour. See generally *Arch. Crim. Pleading.*

RAFFORTS. This is in French Law the duty incumbent upon a legatee to bring into hotchpot such part of the legacy as he has already received by gift *inter vivos*.

RATES: See title **TAXATION**; **TAXES.**

RATIONABILI PARTE BONORUM. A writ that lay for the wife against the executors of her husband, to have the third part of his goods after his just debts and funeral expenses had been paid. *F. N. B.* 122; *Les Termes de la Ley.* See also title **REASONABLE PART.**

RATIONABILIBUS DIVISIS. A writ that lay for the lord of a seignior, when he found that any portion of his seignior or his waste had been encroached upon by the lord of an adjacent seignior, against him who had so encroached, in order to settle their boundaries. *Cowel*; *F. N. B.* 128.

RATIFICATION. This is authorizing subsequently what has been already done without authority; in contract law it is equivalent to a prior request to make the contract; and in the law of torts it often has the effect of purging the tort. *Hall v. Pickersgill*, 1 *B. & B.* 282.

RAVISHMENT DE GARD (*ravishment of Ward*). A writ that lay for the guardian by knight service or in socage against him who took away from him the body of his ward. 12 *Car.* 2, c. 24; *Cowel.*

RE (*in the matter of*). Thus, *Re Vivian* signifies In the matter of Vivian, or in Vivian's case.

READERS. In the Middle Temple those persons are so called who are appointed to deliver lectures or readings at certain periods during the term. The clerks in holy orders who read prayers and assist in the performance of divine service in the chapels of the several inns of court are also so termed. See 5 *Reeves's Eng. Law*, 247 (1st edit.).

READING IN. A new incumbent of a benefice is to read, within two months of actual possession, the morning and evening prayers, and declare his unfeigned assent and consent thereto publicly in the church, before the congregation. He is also to read the thirty-nine articles in the church in the time of common prayer, and to declare his unfeigned assent thereunto, within two months after induction; and to read in his church, within three months after institution or collation, the declaration appointed by the Act of Uniformity, and also the certificate of his having subscribed it before the bishop. The observance of the above forms by a new incumbent constitutes what is termed "reading in." *Rog. Ecc. Law*; *Burns's Ecc. Law.*

REAL. Real and personal property is the most fertile division of things which are the subjects of property in English law. The division is substantially coincident with that into lands, tenements, and hereditaments, on the one hand, and goods and chattels on the other. In the case of each division, the principle underlying the division is feudal; it is directly so in the case of the division into lands and chattels, and indirectly so in the case of the division into real and personal property. As law and society progressed, it became more and more apparent that the essential difference between lands and goods was to be found in the remedies for the deprivation of either; that as to the one, the *real* land, i.e., the land itself could be recovered, and that as to the other, proceedings could be

REAL—*continued.*

had against the *person* only. The two great classes of property accordingly began to acquire two other names that were characteristic of this difference, and with reference to the remedies for the recovery of each were called respectively *real* and *personal* property. The circumstance that a leasehold interest in land is personal property, is a striking illustration both of the origin and of the principle of this division. It is an illustration of the origin, because originally all leases were farming leases, and the farmer was only the bailiff or agent of his landlord, who warranted him in the quiet possession of the land, and against whom, in the case of an ejectment, the farmer had his only remedy in a personal action for damages; it is also an illustration of the principle of the division, because the farmer in the like case of an ejectment had no action for the recovery of the land itself, but at the most (as already stated) an action against his landlord personally, whereby he compelled the latter either to take proceedings for the restitution of the land or else to compensate in damages for the disturbance of the quiet possession.

REAL REPRESENTATIVE. He who represents or stands in the place of another with respect to his real property, is so termed, in contradistinction to him who stands in the place of another with regard to his personal property, and who is termed the personal representative. Thus, the heir is the real representative of his deceased ancestor.

See also title **REPRESENTATION**.

REALTY. That which relates to real property (i.e., to lands, tenements, and hereditaments), in contradistinction to that which relates to personal property (i.e., to moveable things in general), which is termed *personalty*.

REASONABLE PART. The shares to which the wife and children of a deceased person were entitled, were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them. F. N. B. 122.

RE-ATTACHMENT. A second attachment, or an attachment of a person who has been previously attached, and has been dismissed the Court without day, from the happening of some casual circumstance. Cowel.

REBUTTER (from the Fr. *bouter*, that is, to repel, to put back, to bar, &c.). In an action at law the alternate allegations of fact (i.e., the pleadings) are denominated as follows: declaration plea, replication, re-

REBUTTER—*continued.*

joinder, surrejoinder, rebutter, and surrebutter. The declaration is the statement of the plaintiff's cause of complaint; the plea is the defendant's answer to the declaration; the replication is the plaintiff's answer or reply to the plea; the rejoinder is the defendant's answer to the replication; the surrejoinder, the plaintiff's answer to the rejoinder; the rebutter the defendant's answer to the surrejoinder; and the surrebutter the plaintiff's answer to the rebutter.

RECAPTION. Recaption, or reprisal, is a species of remedy by the mere act of the party injured; and is resorted to when any one has deprived another of his property in goods or personal chattels, or wrongfully detains one's wife, child, or servant, in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so that it be not in a riotous manner, or attended with a breach of the peace, which retaking is termed "recaption." There is also a writ of recaption to recover damages against a person who (pending a replevin for a former distress) distrains a man again for the same rent or service.

RECEIVER. He who receives stolen goods from thieves, and conceals them. There are also other kinds of receivers, as the receiver of the fines, who was an officer who received the money of all such as compounded with the king upon original writs in Chancery: the Receiver-General of the Duchy of Lancaster, who is an officer belonging to Duchy Court, who gathers in all the revenues and fines of the lands belonging to that duchy, and all forfeitures and assessments belonging to the same. There is also a person who is appointed by the Court of Chancery to receive the rents, issues, and profits of lands, and the produce and profits of other property which may be the subject-matter of proceedings in that Court, who is called a receiver: this officer has also to manage and take care of such lands and property during the pendency of the suit, and he is appointed by the Court in various cases where it is doubtful to what party the property will ultimately belong; or where a party from incapacity, such as insanity, &c., is incapacitated from receiving the profits of or managing the estate, and the property is in any danger of suffering damage from neglect or otherwise in the meantime.

See also next title.

RECEIVERS AND TRIERS OF PETITIONS. The mode of receiving and try-

RECEIVERS AND TRIERS OF PETITIONS—continued.

ing petitions to Parliament was formerly judicial rather than legislative; and the triers were committees of prelates, peers, and judges; but their functions have long given way to the authority of Parliament at large. By the House of Lords, however, receivers and triers of petitions are still appointed at the opening of every session, as in ancient times. But petitions are, by both Houses, considered now in the first instance, and only referred to triers or committees in certain cases.

RECEIVING STOLEN GOODS. Receiving any chattel, money, valuable security, or other property whatsoever, obtained by felony, knowing the same to have been so feloniously obtained, is a felony, for which the receiver may be indicted and convicted either as an accessory after the fact to the principal felony, or as for a substantive felony, and, in the latter case, whether or not the principal felon shall have been previously convicted. The offence is punishable with penal servitude for any period between five and fourteen years, or with imprisonment for two years or under, with or without hard labour, and with or without solitary confinement, and (if a male under the age of sixteen years) with or without whipping, 24 & 25 Vict. c. 96, s. 91.

RECITAL. The formal statement or setting forth of some matter of fact in any deed or writing, in order to explain the reasons upon which the transaction is founded. The recitals are situated in the premises of a deed; that is, in that part of a deed between the date and the habendum; and they usually commence with the formal word "whereas" (4 Cruise). Their object is to lead up to the occasion which gives rise to the execution of the deed in which they occur, and they are in fact a history of the previous facts and circumstances affecting the property. They sometimes modify the generality of the operative words in the deed, and this is more especially so in a deed of release to executors or trustees.

RECITE, TO. To state or set forth in any deed or other writing such matters of fact as may be necessary to explain the nature of the transaction, or the reasons upon which it is founded. As used in the practice of conveyancing it is somewhat analogous to the word "induce" as used in the practice of pleading.

See also title **RECITAL**.

RECOGNITORS (*recognitores*). A word which was frequently used to signify a jury impanelled upon an assize; so called

RECOGNITORS—continued.

because they acknowledge, e.g., a disseisin, by their verdict. Cowel; Bract. lib. 5, tract 2, c. 9.

See title **JURY, TRIAL BY**.

RECOGNIZANCE. A recognizance is an acknowledgment upon record of a former debt: and he who so acknowledges such debt to be due is termed the recognizer, or cognizor; and he to whom, or for whose benefit, he makes such acknowledgment is termed the recognizee, or cognizee. A recognizance is in most respects similar to a bond; the difference being chiefly that a bond is the creation of a new debt; whereas a recognizance is merely an acknowledgment upon record of a debt which was previously due. The form of a recognizance runs thus:—"That A. B. doth acknowledge to owe to C. D. the sum of £100"; and it is also conditioned to be void on performance of the thing stipulated. It is certified to and witnessed by an officer of some Court, and not by the seal of a party, as in the case of deeds strictly so called (4 Cruise, 103). Recognizances are also frequently taken from persons, either to secure their prosecution of a suit or their presence in Court upon a certain day, or to secure their careful administration of property entrusted to them in some official capacity, e.g., in the cases of administrators, and also of receivers appointed by the Court of Chancery.

RECORD. An authentic testimony in writing contained in rolls of parchment, and preserved in Courts of record. The record of *nisi prius* is an official transcript or copy of the proceedings in an action entered on parchment and sealed and passed, as it is termed, at the proper office; it serves as a warrant to the judge to try the cause, and is the only document at which he can judicially look for information as to the nature of the proceedings, and the issues joined between the parties.

RECORD, COURTS OF. Courts whose acts and judicial proceedings are enrolled in parchment, called the records of such Courts, and are so preserved as a perpetual memorial and testimony thereof. All Courts of record are the King's Courts in right of his crown and dignity, and they usually possess, as incident to them, the power to fine and imprison. Several of the King's Courts, however, are not Courts of record; as the Courts of Equity and the Admiralty Courts, which are at best only *quasi* of record, or of record to themselves. The distinction between Courts of record and Courts not of record, was introduced soon after the Conquest; for by an

RECORD, COURTS OF—*continued.*

edict of the Conqueror's it was ordained that all proceedings in the King's Courts should be carried on in the Norman instead of the English language, in consequence of which the influence of the County Courts, Courts Baron, and other inferior jurisdictions, was much narrowed, for as the judges and suitors of such Courts were ignorant of that language, they were prohibited from recording their acts (3 Ch. Bl. Com. 24; Com. Dig. tit. "Chancery"). One of the privileges which attaches to a Court being a Court of record, is the high authority which their records are allowed to possess, their truth not being permitted to be called in question; it being an almost invariable rule that nothing shall be averred against a record, and that no plea, or even proof, shall be admitted to the contrary. Also, a plea of matter of record need not be put in on oath, but is sufficient without oath; and a decree even of the Court of Chancery, when it has been signed and inrolled (but not sooner), stands on the same footing, at least for all purposes of litigation in that Court itself. 1 Dan. Ch. Pr. 595.

RECORD, TRIAL BY. A species of trial adopted for the purpose of ascertaining the existence or non-existence of a record. When a record is asserted by one party to exist, and the opposite party denies its existence under the form of traverse, that there is no such record remaining in Court as alleged, and issue is joined thereon, this is called an issue of *nul tiel record*; and in such case the Court awards a trial by inspection and examination of the record. Upon this the party affirming its existence is bound to produce it in Court on a day given for the purpose; and if he fail to do so, judgment is given for his adversary. This mode of trial is not only that specially appropriated to try an issue of the above kind, but is, in fact, the only legitimate mode of trying such an issue. Co. Litt. 117 b, 260 a.

See also title *NUL TIEL RECORD*.

RECORDARI FACIAS LOQUELAM. An original writ directed to the sheriff to remove a cause pending in an inferior Court to one of the superior Courts; as from a County Court or Court Baron to the Court of Queen's Bench or Common Pleas. It seems to be called a *recordari* from the circumstance of its commanding the sheriff to whom it is directed to make a record of the proceedings in the Court below, and then to send it up to the superior Court. Reg. Orig.; Cowel.

RECORDER. A barrister or other person learned in the law, whom the mayor

RECORDER—*continued.*

or other magistrate of any city or corporate town (having a jurisdiction, or a Court of record within his precincts) doth by the king's grant associate to him for his better direction in the judicial proceedings of such Court (Cowel). Thus the Recorder of the City of London is practically the judge in the Lord Mayor's Court of the City, although in theory the Lord Mayor and Aldermen are the judges therein.

RECOVERY. A recovery in its most extensive sense is the restoration of a former right by the solemn judgment of a Court of justice. A common recovery was one of the modes of transferring property from one party to another, and is said to have been introduced by the ecclesiastics, in order to avoid the Statutes of Mortmain, by which they were prohibited from purchasing or receiving under pretence of a free gift, any lands or tenements whatever.

To effect this purpose the religious houses used to set up a fictitious title to the lands intended to be given or sold, and brought an action against the tenant to recover them; the tenant, by collusion, made no defence, whereby judgment was given for the religious house, which then recovered the lands by sentence of law upon a supposed prior title. The notoriety and evidence which attended these feigned recoveries was such, that they were soon adopted by lay persons in general, one instance thereof being *Taltarum's Case* (12 Edw. 4), as a usual or common mode of transferring lands, and ever afterwards they continued in use for that purpose, until they were abolished by the Act 3 & 4 Will. 4, c. 74, by which Act a disentailing deed was substituted for them, their principal and almost exclusive use prior to that statute having come to be the barring of an estate tail. In order to explain the nature of a recovery, the manner in which a recovery was suffered (as it was termed) will be here given. The first thing necessary to be done in suffering a recovery was, that the person who was to be the defendant, and to whom the lands were to be adjudged, should sue out a writ of *precipe* against the tenant of the freehold; whence such tenant was usually called the tenant to the *precipe*. In obedience to this writ the tenant appeared in Court, either in person or by his attorney; but, instead of defending the title himself, he called upon some other person, who, upon the original purchase, was supposed to have warranted the title, and prayed that that person might be called in to defend the title which he had warranted, or otherwise to give the tenant lands of equal value to those which he should lose by defect of his

RECOVERY—continued.

warranty; and this was called the *vouching* (*vocatio*), or calling to warranty. The person who was thus called to warrant (and who was usually called the *vouchee*) appeared in Court, was sued and entered into the warranty, by which means he took upon himself the defence of the title to the land. The demandant then desired leave of the Court to imparl, or confer with the *vouchee* in private, which was granted as a matter of course. Soon after the demandant returned into Court, but the *vouchee* disappeared or made default; in consequence of which it was presumed by the Court that he had no title to the lands demanded in the writ, and therefore could not defend them, whereupon judgment was given for the demandant (who was then called the *recoveror*) to recover the lands in question against the tenant, and for the tenant to recover against the *vouchee* lands of equal value, in recompense for those so warranted by him, and which had been lost by his default. 5 Cruise, 223, 281, 285, 286.

See titles CONVEYANCES; DISENTAILING ASSURANCE.

RECTO DE ADVOCATIONE ECCLESIE.

A writ of right, which lay when a man had right of advowson, and the parson of the church dying, a stranger presented his clerk to the church, and the real patron did not bring his action of *quare impedit* or *darrein presentment* within six months, but permitted the stranger to usurp on him, and so was left to his writ of right only to recover his right. This writ lay only where the patron was entitled to the fee in the advowson. Reg. Orig. 29; Cowel.

RECTO DE DOTE. A writ of right of dower, which lay for a woman who had received part of her dower, and proposed demanding the remainder, against the heir of her husband, or his guardian if he were a ward (Old. Nat. Brev. 5; Cowel). Under the C. L. P. Act, 1860, s. 26, no writ of right of dower shall be brought after the commencement of that Act in any Court whatsoever; but instead thereof, an action may be commenced by the ordinary writ of summons, with an indorsement thereon to the effect that the plaintiff intends to declare in dower; and all subsequent proceedings therein are, as nearly as may be, to be taken in accordance with the C. L. P. Acts, 1852 and 1854.

RECTO DE DOTE UNDE NIHIL HABET.

A writ of right of dower, which lay when a man who had divers lands and tenements had assigned no dower to his wife, and she was thereby driven to sue for her thirds against the heir or his guardian (Reg.

RECTO DE DOTE UNDE NIHIL HABET—continued.

Orig. 170; Cowel). Under the C. L. P. Act, 1860, the like provisions are made regarding this action as are stated in the title last preceding to have been made by the same Act regarding the writ of right of dower.

RECTO DE RATIONABILI PARTE.

A writ that lay between privies in blood, as brothers in gravelkind, or sisters, co-heiresses, or other co-parceners, for land in fee simple. As for instance, if a man leased his land for life, and afterwards died, leaving issue two daughters, and after that, the tenant for life died also, and then one sister entered upon the whole of the land, and so deforced the other, then the sister so deforced might have had this writ to recover part. F. N. B. 9; Cowel.

RECTO QUANDO DOMINUS REMISIT.

A writ of right, which lay where lands or tenements that were in the seigniority of any lord were in demand by a writ of right; for if in such case the lord held no Court, or otherwise, at the prayer of the demandant, sent to the King's Court his writ, to put the cause thither for that time (reserving to him at other times the right of his seigniority), then this writ issued out for the other party. Reg. Orig. 4; Cowel.

RECTO SUR DISCLAIMER.

A writ that lay for a lord who had avowed upon his tenant in the Court of Common Pleas, and such tenant had disclaimed to hold of him, on which disclaimer the lord might have this writ; and if he averred and proved that the land was holden of him, he should recover the land for ever. Old Nat. Brev. 150; Cowel.

RECTOR. A governor. *Rector ecclesie parochialis* is he who has the cure or charge of a parish church, *qui tantum jus in ecclesia parochiali habet quantum prelati in ecclesia collegiata*. It appears that when dioceses were divided into parishes, the clergy, who had the charge in those places, were called rectors; afterwards, when their rectories were appropriated to monasteries, &c., the monks kept the great tithes, but the bishops were to take care that the rector's place should be supplied by another, to whom he was to allow the small tithes for his maintenance; and this was the vicar.

See title ADVOWSON.

RECTORY. This word appears to be used for an entire parish church, with all its rights, glebes, tithes, and other profits (Spelm). The word was often used to signify the rector's manse, or parsonage house. Ken. Par. Antiq. 549.

See title ADVOWSON.

RECUSANTS. This word, as used in the statutes, has been expounded to mean all those who separate from the church as established by the laws of this realm (*Les Termes de la Ley*). Numerous laws against recusants were passed in the persecuting times of Charles II., in which reign these recusants were chiefly non-conformists. The term does not, in fact, appear to have ever been applied to Roman Catholics or Jews, but only to Protestant Dissenters.

See title **STATUTES ECCLESIASTICAL**.

REDDENDUM. The reddendum is a clause in a deed by which the grantor reserves something to himself out of what he has granted before. It is situated between the habendum and the covenants in deeds, and usually begins either with the word "yielding" or the word "rendering;" thus in a lease, that clause which commences with the words "yielding and paying" is the reddendum. 4 Cruise, 26.

REDDITION. A judicial confession and acknowledgment that the land or thing in demand belongs to the demandant, and not to the person surrendering. 34 & 35 Hen. 8, c. 24; Cowel.

REDDITUS SICCUS (*dry rent, barren rent*). A rent for the recovery of which no power of distress is given by the rules of the Common Law (3 Cru. Dig. 314). It is also sometimes called rent-seck (Litt. sec. 217, 218. See also Co. Litt. 143a, 143 B, 153a, n. (1). But a power of distress for this rent was given by stat. 4 Geo. 2, c. 28. For the other varieties of *rent*, see title **RENT**.

REDEEMABLE RIGHTS. Such rights as return to the grantor of lands, &c., on repayment of the sum for which such rights were granted. Jacob; Tomlins.

RE-DEMISE: See title **DEMISE**.

REDEMPTION, EQUITY OF: See titles **EQUITY OF REDEMPTION;** AND **MORTGAGE**.

RE-DISEISEIN. A disseisin made by a person who had once before been adjudged to have disseised the same man of his lands or tenements, for which there lay a special writ, termed a writ of re-disseisin. Reg. Orig. 204; Cowel.

REDUCTION. In French Law, when a parent gives away, whether by gift *inter vivos* or by legacy, more than his portion disponible (see that title), the donee or legatee is required to submit to have his gift reduced to the legal proportion.

See also title **HERSHELOT**.

RE-ENTRY. The entering again into or resuming possession of premises. Thus in leases there is a proviso for re-entry of

RE-ENTRY—continued.

the lessor on the tenant not paying the rent, or not performing the covenants contained in the lease; and by virtue of such proviso the lessor may take the premises into his own hands again if the rent be not paid, or the covenants be not observed by the lessee; and this taking possession again is termed re-entry. 2 Cruise, 8; Cowel.

See also title **ENTRY**.

RE-EXCHANGE. The like sum of money payable by the drawer of a bill of exchange, which is returned protested back again to the place whence it was drawn, for the exchange of the sum mentioned in the bill. *Lex Mercat.* 98.

RE-EXTENT. A second extent made on lands and tenements on complaint being made that the former extent was only partially performed. Cowel.

See title **EXTENT**.

REFERENCE. The fact of something being referred. Thus, in the proceedings in a suit in equity, or in an action at law, matters frequently arise which would take up too much of the time of the Court to be brought before it for its decision; and such matters are therefore referred to the masters of the respective Courts, or to special referees, to be inquired into by them. The order of the Court authorizing such a reference is termed an order of reference.

See title **ARBITRATION**.

REFERRING A CAUSE. When a case or action involves matters of account or other intricate details which require minute examination, and for that reason are not fit to be brought before a jury, it is not unusual to refer all matters in difference between the parties to the decision of an arbitrator, and in such a case the cause is said to be referred.

See also title **REFERENCE**.

REFORMATORY. Under the stat. 29 & 30 Vict. c. 117, s. 14, where a juvenile, *i.e.*, person to appear under 16 years of age, is convicted, whether on indictment or in a summary manner, of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the period of ten days or longer, he may be sent to a reformatory school of his own religious persuasion for between two and five years.

REFRESHER. It frequently happens that after the briefs in a cause have been delivered to counsel, the cause, from a press of business or some other reason, is adjourned, or allowed to stand over from one term or sittings to another, which im-

REFRESHER—*continued*.

poses upon counsel the necessity of re-perusing their briefs, in order to refresh their memory upon the various points of the cause; in consideration of which it is usual for the attorney to mark on the briefs which have so been delivered a small additional fee, thence termed a refresher fee.

REGAL FISHES: See title FISH ROYAL.

REGALIA. The royal rights of a king, the king's prerogative; and *regalia facere* is to do homage or fealty when he is invested with the regalia (Cowel). The word is also occasionally used to denote the emblems of sovereignty.

REGARDANT (Fr. looking at). Thus, a villein regardant was called regardant to the manor, because he was charged with doing all base services within the same, and with seeing that the same was freed from all things that might annoy it. Co. Litt. 120; Cowel.

See also title VILLENAGE.

REGE INCONSULTO. A writ issued from the king to the judges, commanding them not to proceed in a cause which may prejudice the king without the king being advised. 18 Vin. Abr. 275, 280.

RÉGIME DOTAL. In French Law, the *dot*, being the property which the wife brings to the husband as her contribution to the support of the burdens of the marriage, and which may either extend as well to future as to present property, or be expressly confined to the present property of the wife, is subject to certain regulations which are summarized in the phrase *régime dotal*. The husband has the entire administration during the marriage; but as a rule where the *dot* consists of immoveables, neither the husband nor the wife, nor both of them together, can either sell or mortgage it. The *dot* is returnable upon the dissolution of the marriage, whether by death or otherwise.

RÉGIME EN COMMUNAUTÉ. In French Law is the community of interests between husband and wife which arises upon their marriage. It is either (1) legal or (2) conventional, the former existing in the absence of any agreement properly so called and arising from a mere declaration of community, the latter arising from an agreement properly so called. Legal community extends to all the moveable and immoveable property of both parties (and the profits thereof) at the time of and during the marriage, and also to all the debts with which either spouse is burdened at the date of the marriage, or which the

RÉGIME EN COMMUNAUTÉ—*contd.*

husband or the wife (with his consent) contracts during the marriage. Under such a community, the husband has the sole management and disposal of the property, but he cannot give them away for nothing, unless it should be for the advancement of the children of the marriage. This community is destroyed by a judicial separation *de corps et de biens*, and the wife recovers the free administration of her goods. Conventional community may be as diverse as the parties choose by their conventions to make it, these conventions most commonly regulating the amount of property which shall be held in common, excluding the after-acquired property from it, or making other such restrictive regulations.

REGISTER. A book wherein things are registered for the preservation of the same; thus a parish register is that book wherein the baptisms, marriages, and burials are registered in the respective parishes; there is also a book wherein are entered the various forms of original and judicial writs, which is termed the register of writs. Co. Litt. 159; Cowel.

See also the two following titles.

REGISTRAR. An officer who has the custody or keeping of a registry. There are several officers of this kind connected with the law. The principal are the registrars of the Courts of Chancery and Bankruptcy and the registrars of births, deaths, and marriages. The registrar of the Court of Chancery is an officer with whom, in certain cases, the defendants are compelled to enter their appearances; and by him the decrees of the Court are drawn up, signed, and passed. As to the duties of the registrars of the Court of Bankruptcy, the reader is referred to the Bankruptcy Act, 1869. The registrars of births, deaths, and marriages are officers appointed under the 6 & 7 Will. 4, c. 86, 7 Will. 4 & 1 Vict. c. 22, and 3 & 4 Vict. c. 92, for the purpose of keeping in their respective districts an exact register of every birth, death, and marriage which may take place therein. The registrars of each union are subjected to the supervision of their "superintendent registrar," and these again are subject to the authority of a superior officer appointed under the great seal, and holding office during the pleasure of the Crown, called the "Registrar General of Births, Deaths, and Marriages in England." See the statutes above referred to.

REGISTRY OF DEEDS. By certain Acts of Parliament all deeds and conveyances (with some exceptions) which affect lands in the counties of Middlesex and

REGISTRY OF DEEDS—*continued.*

York, are required to be registered; that is, an abstract of their substance is required to be entered in a register kept for that purpose. The object of this is that purchasers and mortgagees of lands in these counties by referring to this register may have an opportunity of ascertaining whether the lands they are about to purchase are in any way incumbered or otherwise affected by any prior transactions; and therefore by these statutes, deeds and conveyances are void against subsequent purchasers or mortgagees, unless registered before the conveyances under which such purchasers or mortgagees claim, unless, indeed, the subsequent purchaser or mortgagee had notice of the prior charge (*Le Neve v. Le Neve*, 2 Wh. & Tud. L. C. 28). By a Bill of the present session it was proposed to make the registration of titles to land universal; but the Bill has fallen through for the present.

REGRATING (from *re*, again, and the *Fr. grater*, to scrape). In one sense this word signifies the scraping or dressing of cloth or other goods for the purpose of selling them again. But in its more ordinary sense it means the offence of buying or getting into one's hands at a fair or market any provisions, corn, or other dead victual with the intention of selling the same again in the same fair or market, or in some other within four miles thereof, at a higher price; and he who commits this offence is termed a regrator. 3 Inst. 195; 5 Edw. 6, c. 14.

See also title **FORESTALLING**.

RE-HEARING. When a party seeks to have a decree of the Court of Chancery reversed or altered he may petition for a re-hearing; that is, for the cause to be heard again. Such re-hearing is usually had before the same judge that previously heard the case. It is obtained upon a petition to the Lord Chancellor, accompanied with the certificate of two counsel, one of whom, at least, must have been engaged on the occasion of the former hearing; and the usual ground of it is that there has been an oversight on the part of the judge, resulting in a miscarriage of justice. The certificate is, however, in the most general form, merely stating that the cause is a proper one to be re-heard. In case the re-hearing is that of an order made on motion, then no certificate of counsel is required, and neither is any petition of appeal necessary, but counsel merely moves the Court of Appeal on motion with notice.

See also title **APPEAL**.

REJOINDER: See title **REBUTTER**.

REJOINING GRATIS. Rejoining voluntarily, or without being required to do so by a rule to rejoin. It would seem that when a defendant is under terms to rejoin *gratis*, it means that he must deliver a rejoinder, without putting the plaintiff to the necessity of obtaining a rule to rejoin. *Atkins v. Anderson*, 10 M. & W. 12; Lush's Pr. 396.

RELATOR. A rehearser or teller. It is sometimes used to signify an informer; as in the case of an information being filed by the Attorney-General at the *relation* of some informant, such informant is termed a relator, and the information is said to be at the relation of such person. Such informations are usually laid in the Court of Chancery for the abatement of a public nuisance; the corresponding proceeding in the Courts of Common Law is called an indictment.

RELEASE. A release is a discharge or conveyance of a man's right in lands or tenements to another who already has an estate in possession; as if A. has a lease of lands for a term of years, and B. has the remainder or reversion in fee; here the fee simple of the lands may become vested in A. by B. executing a release of them to A. (4 Cruise, 84). Such a release is said to operate by enlargement of the estate of A. For the other varieties of a release, and the incidents attaching thereto, see title **CONVEYANCES**.

RELEASE TO USES. The conveyance by a deed of release to one party to the use of another is so termed. Thus, when a conveyance of lands was effected, by those instruments of assurance termed a lease and release, from A. to B. and his heirs, to the use of C. and his heirs, in such case C. at once took the whole fee simple in such lands; B., by the operation of the Statute of Uses, being made a mere conduit pipe for conveying the estate to C.

See title **CONVEYANCES**.

RELIEF. A fine or acknowledgment, which, during the feudal system, the heir paid to the lord on being admitted to the feud which his ancestor possessed; it generally consisted of houses, arms, money, and the like; it was called a relief, either because it raised up and re-established the inheritance, or because by it the heir took up or lifted up the inheritance, or in the words of the feudal writers, "*incertam et caduam hereditatem relebatur*" (Knight, 14). It seems that a relief is still payable, if demanded. Wms. R. P. p. 120.

REM, IN: See title **IN PERSONAM**.

REMAINDER. A remainder is defined

REMAINDER—*continued.*

to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man who is seised of lands in fee simple grants them to A. for twenty years, and after the determination of that term, to B. and his heirs for ever; in this case the estate of A. (that is, the interest which A. has in the lands for the twenty years) is termed an estate for years; and the estate of B. (that is, the interest which B. has in the lands after the end of the twenty years) is termed a remainder. In order to constitute or to create a remainder, it is a rule that there must be some particular estate (as it is termed) to support it, that is, at the time of creating a remainder there must be some estate (in the same lands to which the remainder applies) created at the same time to precede the remainder, which preceding estate is termed the particular estate. Thus, in the above instance (of a man who is seised of lands in fee simple granting them to A. for twenty years, and after the determination of that term to B. and his heirs for ever), the estate of A. is termed the particular estate, because it is only a small part, or *particule*, of the inheritance, the residue or remainder of which is granted over to B. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason, that the word "remainder" is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder. Remainders are said to be either vested or contingent. Vested remainders (or remainders executed) are those on the creation of which a present interest passes to the party, though to be enjoyed at a future time, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if an estate is conveyed to A. for twenty years, remainder to B. in fee; here B.'s is a vested remainder, which nothing can defeat or set aside; so that a person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an estate *in presenti*, though it is only to take effect in possession and receipt of the profits at a future period. Contingent (or executory) remainders are such as are limited to take effect in favour of a dubious and uncertain person; as if an estate is conveyed to A. for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is quite uncertain whether B. will have a son or not; but the instant that a son is born, the remainder is no longer contingent, but vested (2 Cruise, 231). There

REMAINDER—*continued.*

two varieties of remainder are defined in Williams's Real Property as follows:—

(1.) A vested remainder is one which is always ready from its creation to its close to come into possession the moment the prior estate determines;

(2.) A contingent remainder is one which is not always so ready.

See also titles **CONTINGENT REMAINDER**; **VESTED REMAINDER**.

REMANET. A remnant, that which remains. Thus the causes which are deferred being tried from one term to another, or from one sittings to another, are termed remanets. 1 Arch. Pract. 375.

REMEMBRANCERS. Were three officers, or clerks, of the Exchequer, who were formerly called clerks of the remembrance. One was called the king's remembrancer; the second, the lord treasurer's remembrancer; and the third, the remembrancer of the first fruits. The king's remembrancer entered in his office all recognizances taken before the barons for any of the king's debts, or for appearances, or for observing of orders; he wrote process against the collectors of customs, subsidies, and fifteenths for the accounts, &c. The lord treasurer's remembrancer made process against all sheriffs, escheators, receivers, and bailiffs, for their account; also of fieri facias and extent for any debts due to the king either in the pipe or with the auditors, &c. The remembrancer of the first fruits took all compositions and bonds for the first fruits and tenths, and made process against such as did not pay the same. Cowel.

RÉMÉRÉ: See title **RACHAT**.

REMISE DE LA DETTE. In French Law is the release of a debt.

REMITTER (*remittere*, to send back). In real property law is a restitution of one who has two titles from the latter defective title, in respect of which he is in possession, to the former complete title which he has to the lands, but in respect of which he is not in possession. It is necessary in order to the principle of remitter taking effect, that the latter title should have come to the party by the act of law; for if it came to him by his own act, he is taken to have waived his former or more ancient title. Co. Litt. 358.

REMITTITUR (*it is remitted*). This word is ordinarily used in two senses; first, for an entry or minute which a plaintiff sometimes makes expressive of his intention to give up or waive the damages which he

REMITTITUR—continued.

has originally demanded in his declaration, whence the entry is called a *remittitur damna*; secondly, to signify the returning or sending back by a Court of Appeal the record and proceedings to the Court whence the appeal came. A common instance of the first description of *remittitur* is afforded in an action of *replevin*, wherein the defendant, having pleaded and established an avowry, cognizance, or justification, is entitled to damages; but as that action is generally brought merely to establish a right, the defendant often excuses or remits the payment of those damages to which he would be otherwise entitled, and when he does so, it is thus recorded in the judgment: "And hereupon the said C. D. freely here in Court remits to the said A. B. his damages aforesaid; therefore let the said A. B. be acquitted thereof." The second sort of *remittitur* is used when, for instance, the House of Lords having affirmed the judgment on a writ of error from the Queen's Bench, returns or remits the record, so that that Court may carry its sentence (so confirmed) into execution. The form is thus entered in the judgment: "Thereupon the record aforesaid, and also the proceedings aforesaid in the same Court of Parliament had in the premises, are remitted by the same Court of Parliament to the Court of our said Lady the Queen, before the Queen herself, wheresoever, &c., to the end that execution may be done thereupon, &c." Tidd's Forms, 574, 615, &c.

RENDER (from the Fr. *rendre*, to return). To give up, to yield, to surrender. Thus, when a defendant who has been arrested, and has obtained his liberty by procuring bail, yields himself up again into custody, in order that the bail may be discharged from their obligation and liability, he is said to render himself in discharge of his bail. 1 Arch. Pract. 872.

RENOUNCING PROBATE. Refusing to take upon oneself the office of executor or executrix. Refusing to take out probate under a will wherein one has been appointed executor or executrix.

RENT (*redditus*). Defined to be an annual return made by the tenant to the landlord, either in labour, money, or provisions, in consideration of the lands or tenements which such tenant holds of his landlord; from which it follows, that though rent must be a profit, yet there is no occasion that it should consist of money. There are three principal kinds of rents, viz., rent-service, rent-charge, and rent-seck. Rent-service consisted of fealty and a certain rent, and this was the only kind

RENT—continued.

of rent originally known to the Common Law; it was called rent-service, because it was given as a compensation for the services to which the land was originally liable. When a rent was granted out of lands by deed, the grantee had not power to distrain for it, because there was no fealty annexed to such grant. To remedy this inconvenience an express power of distress was commonly inserted in the grant. Rent-seck, or barren-rent, is nothing more than a rent for the recovery of which no power of distress is given either by the rules of the Common Law or the agreement of the parties. This third variety of rent arises where a landlord grants away his rent without at the same time granting his reversion to which that rent was incident. But by stat. 4 Geo. 2, c. 28, a power of distress has been made incident both to rents-charge and to rents-seck. There are the following other minor varieties of rents, viz.:—

- (4.) QUIT RENTS, *see* that title;
- (5.) GROUND RENTS, *see* that title;
- (6.) FEE FARM RENTS, *see* that title; and
- (7.) RENTS OF ASSISE, *see* that title.

RENTAL (said to be corrupted from rent-roll). A roll on which the rents of a manor, or other estate, are registered or set down, and by which the landlord's bailiff collects the same. It contains the lands and tenements let to each tenant, the names of the tenants, and other particulars connected therewith. Cunningham

RENT-ROLL: *See* title RENTAL.

RENTS OF ASSISE (*redditus assise*.)

The certain and determined rents of the freeholders and ancient copyholders of manors are called rents of assise, apparently because they were assised or made certain, and so distinguished from *redditus mobilis*, which was a variable or fluctuating rent. 3 Cruise, 314.

REPARATIONE FACIENDA. A writ which lay in various cases; as if, for instance, there were three tenants in common, joint tenants, or *pro indiviso*, of a mill or house which had fallen into decay, and one of the three was willing to repair it, and the other two not; in such case the party who was willing to repair it might have this writ against the other two. Reg. Orig. 153; Cowel.

REPLEADER. To plead again. When, after issue has been joined in an action and a verdict given thereon, the pleading is found (on examination) to have miscarried, and failed to effect its proper object, viz., of raising an apt and material question between the parties, the Court

REPLEADER—*continued.*

will, on motion of the unsuccessful party, award a replender, that is, will order the parties to plead *de novo*, for the purpose of obtaining a better issue. For example, if in an action of debt on bond, conditioned for the payment of £10 10s. at a certain day, the defendant pleads the payment of £10 according to the form of the condition; and the plaintiff, instead of demurring, tenders issue upon such payment; it is plain that whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not to maintain his action; for in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and repayment in part is a question quite beside the legal merits. The Court will after trial grant such replender only if that will be the means of effecting substantial justice between the parties; nor will the Court grant it where it can give judgment *non obstante veredicto* on the whole record. If a replender is granted where it should be refused, or *vice versa*, that is ground of error. The form of the judgment of replender is "*quod partes replacent.*" 2 Arch. Pract. 1553-4.

REPLEVIABLE. Capable of being replevied. Property is said to be repleviable or replevisable when proceedings in replevin may be resorted to for the purpose of trying the right to such property. Thus goods taken under a distress are repleviable, for the validity of the taking may be tried in an action of replevin; but goods delivered to a carrier and unjustly detained are not repleviable, for the unjust detention of goods delivered on a contract is not an injury to which the action of replevin applies, but forms the ground of an action of detinue or trover. See *Galloway v. Bird*, 4 Bing. 299.

REPLEVIN (from *replegiare*, to deliver to the owner upon pledges). A personal action adapted to try the validity of a distress, or to recover the possession of goods unlawfully distrained (Com. Dig. "Replevin"). Where goods have been distrained, and the tenant thinks the distress unlawful, and wishes to contest its validity, the action of replevin is the appropriate remedy to resort to for the purpose. The mode adopted is by the aggrieved party making plaint (i.e., complaint) to the sheriff, and his goods are thereupon replevied, that is, delivered to him upon his giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress; and if upon such trial the right be determined in favour of the latter, then the

REPLEVIN—*continued.*

goods are returned. In form it is an action for damages for the illegal taking and detaining of the goods and chattels (Com. Dig. tit. "Replevin"; 2 Arch. Pr. 1081; Woodfall's Land. and Ten. lib. 3, c. 6, s. 1.

REPLEVY. This word, as used in reference to the action of replevin, signifies to re-deliver goods which have been distrained to the original possessor of them, on his pledging or giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress. It has also been used to signify the bailing or liberating a man from prison on his finding bail to answer for his forthcoming at a future time.

See title REPLEVIN.

REPLICATION (*replicatio*). A reply made by the plaintiff in an action to the defendant's plea, or in a suit in Chancery to the defendant's answer.

See also titles ANSWER; REBUTTER.

REPORT OF COMMITTEE. The report of a parliamentary committee is that communication which the chairman makes to the House at the close of the investigation upon which it has been engaged; and it is usually in the form of a series of resolutions. In the House of Commons he appears at the Bar shortly after the Speaker has taken the chair, and on being called upon, reads his report, brings it up, and it is received by a vote of the House.

REPORTS. The published periodical volumes, which contain the various cases argued and determined in the several Courts of Law and Equity, are so termed. Since the year 1866 inclusive, the chief of these reports are brought out under the superintendence of a council styled the Incorporated Council of Law Reporting for England and Wales; formerly the matter was left to the enterprise of private publishers or of private reporters; and at one time the reports were brought out at the cost of the State.

See title YEAR-BOOKS.

REPRESENTATION AND REPRESENTATIVE. Representation is the act of one person representing or standing in the place of another; and he who so represents or stands in the place of another is termed his representative. Thus, an heir is the representative of the ancestor; and an executor is the representative of the testator; the heir standing in the place of his deceased ancestor with respect to his realty, the executor standing in the place of his deceased testator with respect to his personality; and hence the heir is frequently denominated the real representative, and the executor the personal representative.

REPRESENTATION AND REPRESENTATIVE—*continued.*

In the law of contracts, a representative is an agent; but the term "representative" is little used for this purpose.

In Constitutional Law representatives are those chosen by the people to represent their several interests in Parliament. For this use of the word, see title **REPRESENTATION IN PARLIAMENT**.

REPRESENTATION IN PARLIAMENT.

The custom of sending representatives to Parliament appears to have grown up at a very early period, but the first extant traces of it are comparatively recent. Thus,

(1.) As regards *County Representation*—The earliest extant trace is in 1214, King John having in that year directed the sheriffs to send four discreet knights (*quatuor discretos milites*) of the county to represent it at the Parliament which was to be held at Oxford; and

(2.) As regards *Borough Representation*—The earliest extant trace is in 1265, Simon de Montford having in that year issued writs to the sheriffs directing them to return two citizens or burgesses for every city or borough in their shrievalty; but as Montford was assuming an excess of authority in issuing those writs, that instance of borough representation is not considered of much value, while on the contrary the writs issued to the like effect by Edward I. in 1295 are considered of great value, and they afford the first distinct legal trace that is extant of the summoning of burgesses to Parliament.

It has been suggested, however, that all that Edward I. did in 1295 was to remodel, and for the time being complete, an already existing system of borough representation; and the cases of the boroughs of St. Albans (1315) and of Barnstaple (1315) are commonly adduced in support of the earlier origin of borough representation. For the borough of St. Albans in its petition to the King claimed that to send two burgesses to Parliament was its prescriptive right existing from immemorial antiquity, and the borough of Barnstaple in its petition to the King claimed that to send two burgesses to Parliament was its right under a charter of King Athelstan. Now, the interval between 1295 and 1315 being only twenty years, and the interval between 1295 and 1315 being only forty years, it is clear that the claims put forward by these two boroughs in the manner and to the extent that the same were put forward, would have been egregious and self-confuting if borough representation had *originated* in 1295, or even in 1265.

But the probability, or rather certainty, of an earlier origin of borough representation is borne out and corroborated by the

REPRESENTATION IN PARLIAMENT—*continued.*

causes which led to the deputies from boroughs being summoned at all, these causes having been the following:

The boroughs were increasing in wealth from the growing prosperity of commerce; and the spirit of liberty in England, which had always been strong, and which since Magna Charta grew stronger still, prevented the King or his Government from laying tallages at his own will and pleasure upon the townspeople; and the Crown being in constant want of money, it became a constitutional usage to summon deputies from boroughs for the express and single purpose of granting the necessary tallages.

See also titles **CONSTITUTION; ELECTORAL FRANCHISE**.

REPRESENTATIVE PEERS. The representative peers are those, who at the commencement of every new parliament are elected to represent Scotland and Ireland in the British House of Lords; namely, sixteen for the former, and twenty-eight for the latter country. At the union of Scotland with England in 1707, and of Ireland in 1800, the peers of those two countries were not admitted *en masse* to seats in the British Parliament, but were allowed to elect a certain number of their body to represent them therein; hence the term "representative peers." The Scottish representative peers must have descended from ancestors who were peers at the time of the union.

See also title **REPRESENTATION IN PARLIAMENT**.

REPRIVE. The withdrawing, or suspending, for a time sentence of execution against a prisoner. *Les Termes de la Ley*.

REPRISAL: See title **MARQUE**.

REPUTED, REPUTATION. The general, vulgar, or public opinion respecting anything. Thus, land may be reputed part of a manor, though not really so, and a certain district may be reputed a parish or a manor, or be a parish or a manor in reputation, although in reality no parish or manor at all.

REPUTED MANOR: See title **MANOR**.

REPUTED OWNER. He who has the general credit or reputation of being the owner or proprietor of goods, is said to have the reputed ownership in them, or to be the reputed owner thereof.

REQUEST, LETTERS OF: See title **LETTERS OF REQUEST**.

REQUESTS, COURT OF: See title **CONSCIENCE, COURTS OF**.

RESCOUS, or RESCUE (Fr. *recous*, rescue). A resistance against lawful authority. As for instance, the taking back by force goods which have been taken under a distress; or the violently taking away a man who is under arrest, and setting him at liberty, or otherwise procuring his escape, are both so denominated; and for which writs of *rescous* used to lie, and now an ordinary prosecution for the rescue lies against such offenders, offending parties, or *rescussors*, as they were termed. Co. Lit. lib. 2, cap. 12; *Parrett Navigation Company v. Stower*, 6 M. & W. 564.

RESERVATION. In conveyancing a clause of reservation is a clause whereby the grantor or lessor reserves either to himself or to the lord of the fee some money, chattel, or service not being part of the thing granted or demised or an appurtenance thereto. A reservation, strictly so called, cannot be made in favour of a stranger, although such an attempted reservation might be good as a condition for payment of an annual sum in gross. And it follows from the definition, that a man cannot grant an estate and reserve part thereof, or make a feoffment in fee, and reserve a lease for life; also, that a man cannot reserve rent to his heirs without first reserving it to himself. A *reservation* is often confounded with an *exception*, but the true distinction between them is, that in a reservation some new hereditament is created, and that usually of an incorporeal kind, whereas in an exception a slice (so to speak) of an already existing hereditament is merely withheld, or (as the name denotes), excepted, out of the conveyance.

See title EXCEPTION.

RE-SETTLEMENT: See titles SETTLEMENT OF REALTY; and ESTATE TAIL.

RESIDUARY. The remaining portion or residue. Thus residuary estate or property signifies the remaining part of a testator's estate and effects after payment of debts and legacies, &c., or that portion of his estate and effects which has not been particularly devised or bequeathed. A residuary legatee is he to whom a testator bequeaths the residue of his estate and effects, after the payment of such others as are particularly mentioned in the will. Toller, 269.

See titles ABATEMENT; LAPSE; LEGACY.

RESIGNATION OF LIVINGS: See title SIXONY.

RESPITE, TO. To adjourn, to forbear, to forego. &c. Thus to respite an appeal at the sessions appears simply to mean to adjourn it to some future period, or to forbear bringing it on at the time it was first

RESPITE, TO—continued.

entered for. Respiting of homage is the forbearing to enforce the duty of homage from a tenant who held his lands in consideration of doing homage to his lord.

See also title REPRISAL.

RESPITE OF HOMAGE. The forbearing or dispensing with the performance of homage by tenants who held their lands in consideration of performing homage to their lords. Such a respite was, most frequently, granted to those who held by knight service in *capite*, who paid into the Exchequer every fifth term some small sum of money to be respited from doing their homage. Cowel.

RESPONDEAT, or RESPONDEAS, OUSTER. Upon an issue in law arising on a dilatory plea, the form of the judgment is that the defendant answer over, which is thence called a judgment of *respondeat ouster*. This not being a final judgment, the pleading is resumed, and the action proceeds. Steph. Pl. 115.

RESPONDEAT SUPERIOR (*let the superior answer*). The phrase is thus used in an old work,—*Pur insufficiency del bayliff d'un liberty respondeat dominus libertatis*, i.e., for the insufficiency of the bailiff of a liberty, let the lord of the liberty answer, (4 Inst. 114; Cowel). The phrase, as used at the present day, simply denotes that the principal is to answer for the act of his agent, special or general, done within the limits of his agency. A landlord also answers for, i.e., defends, his tenant.

RESPONDENT. The party who appeals against the judgment of an inferior Court, is termed the appellant; and he who contends against the appeal the respondent. The word also denotes the persons upon whom an ordinary petition in the Court of Chancery is served, and who are, as it were, defendants thereto. The terms respondent and co-respondent are used in like manner in proceedings in the Divorce Court.

RESPONDENTIA. A contract by which the master or owner of a ship borrows money upon the goods and merchandise in the vessel, which must necessarily be sold or exchanged in the course of the voyage, and in which case the borrower personally is bound to answer the contract, and is therefore said to take up money at *respondentia*. The general nature of a *respondentia* bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void if he pay the lender the sum borrowed

RESPONDENTIA—*continued.*

and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage (2 Park on Insurance, 615). But such a contract is now usually called a *bottomry bond*, although (as the name denotes), the latter phrase was appropriate only where the vessel itself, or *bottom*, was included in the security. Maude & P. Merch. Sh. 433; Kay's Law of Shipping.

See titles **BOTTOMRY BOND**; **HYPOTHECATION**.

RETS. The days of grace which, according to the custom of commercial countries, are allowed for the payment of foreign bills and notes. The word is also used in reference to account between a debtor and a creditor, and in this sense, signifies the making a pause in the account by striking a balance therein (see *Butler v. Harrison*, Cowp. 566). The account which is taken against a mortgagee in possession is commonly directed to be taken with *rets*, and he is thereby charged with interest as from the dates of the respective *rets* upon the balance of proceeds over interest.

RESULTING USE: See title **USE**.

RESUMPTION. This word, as used in the stat. of 31 Hen. 6, s. 7, particularly signifies the taking again into the king's hands such lands or tenements as before, upon some false suggestion or other error, he had delivered to the heir, or granted by letters patent to any man (Cowel; *Les Termes de la Ley*). The policy of the resumption of royal grants of lands, was much agitated after the Revolution in 1688, owing chiefly to the lavish way in which William III. made such grants to the Duke of Portland and others.

RETAINER. Is commonly used to signify a notice given to a counsel by an attorney on behalf of the plaintiff or defendant in an action, in order to secure his services as advocate when the cause comes on for trial. This notice is invariably accompanied with a fee called a retaining fee.

See also titles **ATTORNEY**; **BARRISTER**.

RETORNO HABENDO. A writ that lies for the distrainer of cattle, goods, and chattels, &c. (and who, on *replevin* brought, has proved his distress to be a lawful one), against him who was so distrained, to have them returned to him according to law, together with damages and costs (2 Arch. Pract. 1091). If to the *retorno habendo* the sheriff returns that the goods, &c., are cloigned, the defendant may then sue out a

RETORNO HABENDO—*continued.*

writ of *capias in withernam*, requiring the sheriff to take other goods, &c., of the plaintiff instead of those cloigned; and in the absence of any such other goods, the goods of the pledges may then be taken on a *sci. fa.* 2 Arch. Pract. 1096.

RETRAHIT (*he has withdrawn*). A *retrahit* is an open and voluntary renunciation in Court of a suit by the plaintiff, by which he for ever loses his action. A *retrahit* is very similar to a *nolle prosequi*, the difference between them being that a *retrahit* is a bar to any future action for the same cause, whereas a *nolle prosequi* is not, unless made after judgment. 2 Arch. Pract. 1515; *Herber v. Sayer*, 2 Dowl. & L. 65, n. (b).

See title **JUDGMENT**.

RETURN. This is a word which is commonly applied to writs and judges' summonses, and literally signifies much the same as it does in its popular sense, viz., to return or send back anything. Thus, writs are directed to certain persons (as to sheriffs, for instance), commanding them to perform certain acts, and after a certain time to return the same into the Court again, together with a certificate or memorandum certifying or stating what they have done in pursuance of such command. This memorandum or certificate is written on the back of the writ, and is now commonly called the return to it; so that when a writ is directed to a sheriff commanding him to perform certain acts (as to arrest a man, or to return an M.P. for instance), and the sheriff in due time returns the writ, together with such a memorandum as above described, indorsed thereon, this memorandum is then called the sheriff's return; and for a false return, he is civilly responsible. Before the 2 Will. 4, c. 39, writs for the commencement of personal actions, viz., writs of summons, *capias*, and *detainer*, were obliged to be returned upon certain fixed days in term, which were thence called the return days of the term; now, however, this is not the case, the return day being regulated by the service, or execution, of the writ. The meaning of the word "returnable," as applied to a judge's summons, is nearly the same, signifying the time appointed by the judge in the summons for hearing the parties on the subject-matter of dispute; the summons is said to be returnable at such time, because the party who takes out such summons returns with it at the time therein appointed to the place whence he took it out. 1 Arch. Pract. 160; *Smith's Action at Law*, 241.

REVE, or **GREEVE** (from the Sax.

REVE, or GREEVE—*continued.*
gerefa, a prefect). The bailiff of a franchise or manor; hence, shire-reve is used for a sheriff, &c. Cowel.

REVELAND. Such land as having reverted to the king after the death of his thane, who had it for life, was not afterwards granted out to any other person by the king, but remained in charge on the account of the reve or bailiff of the manor, who it seems usually kept the profit of it himself, till it was discovered and presented to the king. Domesday; Spelman on Feuds.

REVENUE: See title TAXATION.

REVERSAL OF JUDGMENT. The annulling or making a judgment void on account of some error in the same.

REVERSION. That which reverts or returns to a person. An estate in reversion is defined, or rather described, by Lord Coke to be "the returning of the land to the grantor or his heirs after the grant is determined." The idea of a reversion is founded on the principle that where a person has not parted with his whole estate or interest in a piece of land, all that which he has not given away remains in him, and the possession of the land reverts or returns to him upon the determination of the preceding estate. Thus, if a person who is seised in fee of lands conveys them to A. for life, he still retains the fee simple of the lands, because he has not parted with it; but as that fee simple can only return or fall into possession upon the determination or ending of the preceding estate (i.e., of A.'s estate for life), it is only a fee simple estate in reversion. So that, perhaps, a reversion may be shortly defined as "the residue of an estate left in the grantor." The interest which a man has in lands in reversion is commonly called a reversionary interest. 2 Cruise, 395, 396.

REVERSIONARY INTEREST. The right, title, or interest, which a person has in or to the reversion of lands or other property. A right to the future enjoyment of property at present in the possession or occupation of another is also frequently so called.

See title REVERSION.

REVERSIONS, SALES OF. These are no longer to be set aside on the ground of undervalue merely (31 Vict. c. 4); but this statute does not affect the jurisdiction of Courts of Equity over improper sales by unwary young men. *Tyler v. Yates*, L. R. 6 Ch. 665.

See also title USURY.

REVERTER, FORMEDON IN: See title FORMEDON.

REVEST. To place one in the possession of anything of which he has been divested, or put out of possession. See 1 Roper, Husband and Wife, 353. It is opposed to DIVERST.

REVIEW, BILL OF. A bill filed to reverse a decree in Chancery, which, after it has been duly enrolled, a party may find good grounds for having reversed, either from error apparent on the face of it, or from new facts discovered since the decree was made, or at least since publication passed in the cause, and which consequently could not be used when the decree was made. 2 Dan. Ch. 1422; *Hunter's Suit* in Eq. 182. This bill is an alternative remedy with an appeal to the House of Lords.

See also title RE-HEARING.

REVIEW, COMMISSION OF. A commission sometimes granted in extraordinary cases to reverse the sentence of the Court of Delegates when it was apprehended they had been led into a material error.

REVIEW, COURT OF. A Court established by 1 & 2 Will. 4, c. 56, for the adjudicating upon such matters in bankruptcy as before were within the jurisdiction of the Lord Chancellor. It formed a constituent and most important part of the Court of Chancery, and exercised a general jurisdiction in bankruptcy, the same as had theretofore been exercised by the Lord Chancellor; and all such matters to be heard and determined in the Court of Review were to be subject to an appeal to the Lord Chancellor on matters of Law and Equity, or on the refusal or admission of evidence. This Court has long ceased to exist, and in lieu of it there is an appeal to the Lords Justices in Chancery, or (in matters of unusual legal importance) to the Lord Chancellor and Lords Justices together. See Bankruptcy Act, 1869.

REVIEWING TAXATION. The re-taxing or re-examining an attorney's bill of costs by the Master. The Courts sometimes order the Masters to review their taxation, when, on being applied to for that purpose, it appears that items have been allowed or disallowed on some erroneous principle, or under some mistaken impression. Arch. Pract.

REVIVING. In law signifies much the same as it does in its popular sense, viz., renewing, calling to life again, &c. Thus, when a certain time (formerly a year and a day, but now six years) has elapsed after judgment is signed, without execution being sued out upon it, the law presumes that the judgment has been exc-

REVIVING—*continued.*

cuted, or that the plaintiff has released the execution; and the plaintiff, in order to sue out execution, must in that case first revive the judgment against the defendant by a writ of *scire facias*, or now, under the O. L. P. Act, 1852, s. 129, either by suing out a writ of revivor, or (with the leave of the Court or a judge), by merely entering a suggestion upon the roll to the effect that it manifestly appears to the Court that the party applying for leave is entitled to have execution of the judgment and to issue execution thereon (2 Arch. Prac. 1133). And by s. 134 of the same Act, a writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order: if more than ten years old, not without a rule of Court or a judge's order; nor if more than fifteen years old, without a rule to shew cause.

REVIVOR, BILL OF. A bill in Chancery which is filed for the purpose of reviving or calling into operation the proceedings in a suit, when, from some circumstances (as for instance, the death of a plaintiff), the suit has abated. It is not, however, in all cases that the death of a party abates the suit; for it is a general rule, that wherever the right of the party dying survives to his co-plaintiff or co-defendant, and the cause is in the same condition after the party's death as it was before, then the suit does not abate, and consequently does not require to be revived. There are also many provisions under recent statutes enacting that certain events shall not abate the suit, and providing for the continuance thereof without the trouble of resorting to a bill of revivor.

See title **ABATEMENT**.

REVOCAION, POWER OF. The power to revoke or call back something granted. As if any one makes a conveyance of any lands, with a clause of revocation, at his will and pleasure, of such conveyance; here the clause by which such person reserves to himself the power of revoking such conveyance is termed a power of revocation. 4 Cruise, 466.

RIDER. A rider, or rider-roll, signifies a schedule or small piece of parchment annexed to some part of a roll or record. It is frequently familiarly used for any kind of schedule or writing annexed to a document which cannot well be incorporated in the body of such document. Thus, in passing bills through Parliament, when a new clause is added after the bill has passed through committee, such new clause is termed a rider.

RIDINGS. The three great divisions

RIDINGS—*continued.*

of the county of York are called the North, West, and East Ridings. The word "riding" is said to be a corruption of tri-thing, meaning the third part of a county.

RIENS ARREAR (*nothing in arrear*). A kind of plea used in an action of debt upon arrearages of account, by which the defendant alleges that there is nothing in arrear. Cowel.

RIENS PER DESCENT (*nothing by descent*). A plea pleaded by an heir to an action brought against him for debt due by his ancestor to the plaintiff, signifying that he has received nothing from his ancestor, and therefore is not liable for his ancestor's debt.

RIGHT (jus). A lawful title or claim to anything.

RIGHT, WRIT OF: See title **WRIT OF RIGHT**.

RIGHT CLOSE, WRIT OF. A writ which the king's tenants in ancient demesne were entitled to, in order to try the right of their property in a peculiar Court of their own, called a Court of ancient demesne.

RIGHT TO BEGIN. This is the phrase which denotes the right of the one or other party to an action or suit to open the case. It involves the right to reply; the reply being often most effective, especially in trials before a jury, it is sometimes a considerable advantage to the party who has the right to begin. The general rule deciding the matter is the following:—Supposing no evidence were adduced on either side, the party against whom the verdict would be given has the right to begin. This rule, however, does not mean that the defendant (if it should so happen) must open the pleadings; for in every case, without one exception, these are opened by the plaintiff or his counsel. The rule has therefore reference to the evidence merely. There are the three following principal applications of the rule:—

(1.) The plaintiff begins, if the onus of proving any one of the issues rests on him;

(2.) The defendant begins, if the onus of proving not a single issue rests on the plaintiff, but all of them on the defendant; and

(3.) Where the burden of proving all the issues lies on the defendant, and the burden of proving the amount of the damage only lies on the plaintiff, then the plaintiff begins (*Carter v. Jones*, 6 C. & P. 64), although formerly the rule in that case was that the defendant should begin. *Cooper v. Wakley*, 3 C. & P. 474.

RINGS, GIVING. A custom observed by sergeants-at-law on being called to that degree or order. These rings bear the inscription of some motto selected by the serjeant about to take the new degree. Thus we find it noted in 2 Q. B. Rep. 425, that Cresswell Cresswell, of the Inner Temple, Esq., was appointed a judge of the Common Pleas, in Hilary Term, 5 Vict., being first called to the degree of serjeant-at-law, when he gave rings with the motto "*Leges juraque.*"

RIOT. If three or more persons assemble together with an intent mutually to assist each other against any one who shall oppose them in the execution of some enterprise of a private nature, with force or violence against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful, and though they after depart of their own accord without doing anything, it is an unlawful assembly. If after their first meeting they move forward towards the execution of their intended purpose, whether they actually execute that purpose or not, this, according to general opinion, is a rout. And if they put it into execution, then it is a riot. And if any person encourages, promotes, or takes part in such riot, whether by words, signs, or gestures, or by wearing the badges or ensigns of the rioters, he is considered a rioter. 1 Hawk. c. 65, s. 1; Arch. Crim. Law, 841.

RIVERS. With reference to navigable rivers, *see* title NAVIGATION. The law as to non-navigable rivers is as follows:—

(1.) The soil, *usque ad medium flum* *viz.* usually belongs to the adjoining proprietors on each side of the river, and that in proportion to their estates along the bank. *Bickett v. Morris*, L. R. 1 H. L., Sc. 47.

(2.) Accretions from the gradual change or deflection of the course of the river become the property of the adjoining proprietor (*Ford v. Lacey*, 7 Jur. (N.S.) 684); similarly accretions by *alluvio*. *Mussumat Imam Banti v. Hurgovind Ghose*, 4 Moo. Ind. App. 403.

(3.) The use of the banks is incident to the use of the river, and persons having the latter right have the former also; the right of fishing in non-navigable rivers belongs to the adjoining proprietors, and such right is protected by the stat. 30 Vict. c. 18, and its violation is made a criminal offence by stat. 24 & 25 Vict. c. 96.

See titles ALLUVIO; FISHERY.

ROBBERY. The felonious and forcible taking from the person of another goods or money to any value by violence or putting

ROBBERY—*continued.*

him in fear. 1 Hawk. P. C. 25; Arch. Crim. Law, 412.

See also title LARCENY.

ROLL. A schedule or sheet of parchment on which legal proceedings are entered. Thus, the roll of parchment on which the issue is entered is termed the issue roll. So the rolls of a manor, wherein the names, rents, and services of the tenants are copied and inrolled, are termed the Court rolls. There are also various other rolls, as those which contain the records of the High Court of Chancery, which are kept in the Rolls Office of the Chancery; those which contain the registers of the proceedings of our old Parliaments, and which are called rolls of Parliament; that in the Inner and Middle Temple, called the calves-head roll, wherein every benchman was taxed annually 2s., every barrister 1s. 6d., and every gentleman under the bar 1s., to the cook and other officers of the house, in consideration of a calves-head dinner provided for them in Easter Term, &c. Orig. Jur. 199; Cowel.

ROLLS COURT: *See* title MASTER OF THE ROLLS.

ROYAL ASSENT. The royal assent is the last form through which a bill goes previously to becoming an Act of Parliament; it is, in the words of Lord Hale, "the complement and perfection of a law." The royal assent is given either by the queen in person, or by royal commission by the queen herself signed with her own hand. It is rarely given in person, except at the end of the session, when the queen attends to prorogue Parliament.

See title LE ROY LE VEUT.

ROYAL FISH. The whale and sturgeon are so called; and these, when either thrown ashore or caught near to the shore, belong to the Crown.

ROYAL MINES. Those mines which are properly royal, and to which the king is entitled when found, are only those of gold and silver.

ROYALTIES. The rights or prerogatives of the king are so called (*see* title PREROGATIVE). The dues of the lessor or landlord of mines are also called *royalties*, apparently in analogy to the *superiorities* of the Crown.

RULE. This word is used in various senses. In its most common acceptation it signifies an order made by the Court at the instance of one of the parties in a suit, usually commanding the opposite party to do some act, or to shew cause why some act should not be done. A rule of this

RULE—*continued.*

kind is said to be either a rule nisi, *i.e.*, to shew cause, or a rule absolute. A rule nisi or to shew cause commands the party to shew cause why he should not do the act required, or why the object of the rule should not be enforced. A rule absolute commands the subject-matter of the rule to be forthwith enforced. There are some rules which the Courts authorize their officers to grant as a matter of course without formal application being made to them in open Court, and these are technically termed side-bar rules, because formerly they were moved for by the attorneys at the side bar in Court; such, for instance, was the rule to plead, which was an order or command of the Court requiring a defendant to plead within a specified number of days. Such also were the rules to reply, to re-join, and many others, the granting of which depended upon settled rules of practice rather than upon the discretion of the Courts; all of which are rendered unnecessary by recent statutory changes. The word "rule," when used as a verb, seems to have two significations: (1) to command or require by a rule of Court, as, for instance, to rule the sheriff to return the writ, to rule the plaintiff to reply; (2) to settle or decide a point of law arising upon a trial at nisi prius, and when it is said of a learned judge presiding at such a trial, that he ruled so and so, it is thereby meant that his lordship laid down, settled, or decided such and such to be the law. The rules for regulating the practice of the Courts, and which the judges are empowered to frame, and to put in force, as occasion may require, are also termed Rules of Court. Rules, chiefly of practice or of pleading, are also now commonly made by the judges for the carrying out of the provisions of any Act of Parliament involving important changes in the law. See Bankruptcy Act, 1869; Judicature Act, 1873.

RULE OF COURT. The rules for regulating the practice of the different Courts, and which the judges are empowered to frame, and to put in force as occasion may require, are termed Rules of Court.

RULE, TO. Is commonly used in two senses: (1) for commanding or requiring by a rule or order of Court, as to rule a sheriff to return a writ, &c.; (2) for laying down, or deciding, or settling a point of law. See the word used by Lord Denman in *Bingham v. Stanley*, 2 Q. B. Rep. 125.

See also title **RULE**.

RULES OF THE KING'S BENCH PRISON. Were certain limits without the

RULES OF THE KING'S BENCH PRISON—*continued.*

walls, within which all prisoners in custody in civil actions were allowed to live, upon giving security by bond with two sufficient sureties to the marshal not to escape, and paying him a certain percentage on the amount of the debts for which they were detained. Bagley's Pract.

RUNNING WITH THE LAND. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. Thus, if A. grants B. a lease of the land for twenty-one years, and the lease, amongst other covenants, contains a covenant on the part of A. for the quiet enjoyment of the land by B. during the term, and also a covenant on the part of B. to cultivate the land demised in a particular manner, and B. afterwards assigns the land to C. for the residue of the term, in this case the liability to perform the covenant made by B. and the right to take advantage of the covenant made by A. would devolve upon C. as assignee of the land to which the covenants related, and in so doing they would be said to run with the land. *Noke v. Awdler*, Cro. Eliz. 436; *Cockson v. Cock*, Cro. Jac. 125. See also notes to *Spencer's Case*, 1 Sm. L. C. 45.

See title **COVENANT**.

RUNNING WITH THE REVERSION. A covenant is said to run with the reversion when either the liability to perform or the right to take advantage of it passes to the assignee of that reversion. Thus, if A. grants a lease of land to B. for twenty-one years, and the lease, amongst other covenants, contains a covenant on the part of A. for the quiet enjoyment of the land by B. during the term, and also a covenant on the part of B. to cultivate the land demised in a particular manner, and A. afterwards assigns the reversion in the land to C., in this case the liability to perform the covenant made by A., and the right to take advantage of the covenant made by B., would devolve upon C. as assignee of the reversion in the land to which the covenants related; and in so doing they would be said to run with the reversion. See *Noke v. Awdler*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 B. & A. 392; *Middlemore v. Goodall*, Cro. Car. 503; *Cockson v. Cock*, Cro. Jac. 125; and notes to *Spencer's Case*, 1 Sm. L. C. 45.

And see title **COVENANT**.

RURAL DEAN: See title **DEAN**.

RURAL DEANERY. The circuit or jurisdiction of a rural dean is so called. See title **DEAN**.

S.

SACRILEGE. A desecration of any thing that is holy. The alienation of lands which were given to religious purposes to laymen, or to profane and common purposes, was also termed sacrilege. Cowel.

SAFE CONDUCT. A guarantee or security granted by the king under the great seal to a stranger for his safe coming into and passing out of the kingdom. Cowel.

SAFE-GUARD. A security given by the king to a stranger who fears the violence of some of his subjects, for seeking his right by course of Law. Reg. Orig. 26; Cowel.

SALE. The transferring of property from one man to another in consideration of some price or recompense in value, i.e., for valuable consideration.

The contract of sale in English Law is a real contract, or in the nature of a real contract, some tender or transfer being required by the Common Law to make the sale complete; in Roman Law, on the other hand, the contract of sale is a consensual contract, being complete as soon as the price is agreed on. The two systems of law agree in this, that so soon as the sale of a specific article or ascertained bulk is complete, all risk attaching to it forthwith rests upon the purchasers, the Roman Law expressing this rule in the maxim "*Periculum rei venditæ statim ad emptorem pertinet*," and the English law in the maxim "*Res perit domino*;" and that in the case of a non-specific article or unascertained bulk, the risk does not so rest, until the article or bulk becomes specific or is ascertained. But there is this very striking difference between the English and the Roman Law in the contract of sale, namely, that in English law the PROPERTY in a specific article (or in a non-specific article or unascertained bulk so soon as the same becomes specific or ascertained) passes to and vests in the purchaser even before delivery, the vendor retaining only a lien on it while in his possession for the price; whereas, in Roman Law such property does not pass into the purchaser until after payment of the price and also delivery of the article. See, generally, Benjamin on Sales; and Just. Inst. ii. l. 1, and iii. 23 (24), pref.

SALE, BILL OF : See title BILL OF SALE.

SALE ON APPROVAL. This phrase and the corresponding phrases "sale on trial" and "sale or return," is a sale dependent upon a condition precedent, viz., the con-

SALE ON APPROVAL—continued.

dition of the purchaser being satisfied with or approving the goods. The approval may be implied from keeping the goods beyond a reasonable time. Benjamin, 483.

SALE WITH ALL FAULTS. In this case, unless the seller fraudulently and inconsistently represents the article sold to be faultless, or contrives to conceal any fault from the purchaser, the latter must take the article for better or worse. *Baglehole v. Walters*, 3 Camp. 154.

SALIQUE LAW. An ancient law made by Pharamond, King of the Franks, by which males only were capable of inheriting. Cowel.

SALVAGE. Is the compensation allowed to persons by whose assistance a ship or boat, or the cargo of a ship, or the lives of the persons belonging to her, are saved from danger or loss in cases of shipwreck, derelict, capture, and the like. And a salvor is he who renders such assistance. The chief statutory provisions at present in force with reference to wreck and salvage are contained in Part VIII. of the stat. 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854).

The services entitling to salvage must be such as demanded skill, enterprise, and risk on the part of the salvors; for mere ordinary services, as towage, no salvage is claimable (*The Princess Alice*, 3 W. Rob. 138). Moreover, these services must have been attended with success (*The Edward Hawkins*, 31 L. J. (Adm.) 46); for salvage, it is said, is a reward for services actually conferred, not for services attempted to be conferred (*The Chetah*, 5 Moo. P. C. C. (N.S.) 621). There may be a valid agreement regarding salvage between the master of a vessel and the salvors, and such agreement will be binding on the owner of the ship (*The Firefly*, Sw. 240), unless proved to be dishonest and exorbitant, or to have been obtained by compulsion or fraud. *The Helen and George*, Sw. 368.

The right to salvage may be forfeited either totally or partially by misconduct on the part of the salvors, but the evidence of misconduct must be conclusive (*The Charles Adolphe*, Sw. 153). A towing ship, if it render salvage services, will be entitled to salvage reward like any other ship (*The Retriever v. The Queen*, 17 L. T. (N.S.) 329). Similarly, one of the vessels which have been in collision may, if the innocent party, be entitled to salvage for services rendered to the other party, and that notwithstanding 25 & 26 Vict. c. 63, s. 33; but not so, if both ships were equally in fault (*Cargo ex Capella*, L. R. 1 A. & E. 356).

SALVAGE—*continued.*

The following persons may become entitled to salvage: (1.) Officers and crews of Her Majesty's ships; (2.) Pilots, but not for mere pilotage services; (3.) Seamen of the abandoned wreck; (4.) Shipagents; (5.) Ship-owners; (6.) Masters of vessels; (7.) Beachmen, guardsmen, and others; but not *passengers* on board the wreck.

With reference to the amount of salvage, the Court of Admiralty never allows more than a moiety for salvage, however meritorious the salvage services may have been (*The Inca*, Sw. 370); the value is to be calculated at the place where the services terminate; also, *pro rata itineris peracti*, and the other equities of the case (*The Norma*, Lush. 124). Ship and cargo must each pay its own share of salvage (*The Pyrennee*, B. & L. 189); and as between different salvors, the Court is able, under the Merchant Shipping Act, 1854, s. 498, to decree an equitable apportionment. *The Enchantress*, Lush. 93. And see generally Kay on Shipping.

SANCTUARY. A consecrated place which had certain privileges annexed to it, and to which offenders were accustomed to resort in order to evade the severity of the law. Staunf. Pl. Cor. lib. 2, c. 38.

• See title ABJURATION.

SANE MEMORY. Sound mind, memory, and understanding. This is one of the essential elements in the capacity of contracting; and the absence of it in *lunatics* and *idiots*, and its immaturity in *infants*, is the cause of their respective incapacities or partial incapacities to bind themselves. The like circumstance is their ground of exemption in cases of crime.

SATISFACTION. The satisfying a party by paying what is due to him, or what is awarded to him by judgment of the Court or otherwise. Thus a judgment is satisfied by payment of the amount due to the party who has recovered such judgment, or by the party's levying the amount or otherwise. The *entry of satisfaction* on the roll is a memorandum which is entered on the judgment roll, by which the party who has recovered the judgment acknowledges that he has been satisfied by his opponent by payment of the damages, costs and charges, &c., and therefore that he may be acquitted thereof. A *satisfaction piece* is a memorandum written on a piece of parchment, stating that satisfaction is acknowledged between the plaintiff and the defendant. This memorandum or satisfaction piece, as it is called, is taken to one of the masters of the Court, and from it he *enters the satisfaction* on the roll before mentioned. 1 Arch. Pract. 722.

SATISFACTION IN EQUITY. Is a doctrine somewhat analogous to Performance in Equity (see that title), but differs from it in this respect, that satisfaction is always something given either in whole or in part as a substitute and equivalent for something else, and not (as in Performance) something that may be construed as the identical thing covenanted to be done. The subject of satisfaction divides itself into four, or rather three branches, viz.:—

- (1.) The satisfaction of debts by legacies;
- (2.) The satisfaction of legacies by legacies; and
- (3.) The satisfaction of legacies by portions, and of portions by legacies.

(1.) *Debts by Legacies.*—The general rule in this case is, that a legacy equal to or greater than the debt is a satisfaction; but that a legacy less than the debt is not even a satisfaction of it *pro tanto*; and in determining what is *less*, that may be either in amount, or in time of payment, or in certainty of payment. And as the leaning of the Court in this case is against satisfaction, very slight circumstances are allowed to rebut the doctrine of satisfaction, so that the creditor will take cumulatively both his debt and the legacy.

(2.) *Legacies by Legacies.*—The general rule in this case is, that if the two legacies are: (a.) In the same instrument, when if different in amount, the legatee takes both, but if equal in amount, one only; and if the two legacies are, (b.) In different instruments, then whether they are different or equal in amount, the legatee takes both; with one exception, viz., that where the legacies are equal in amount, and the same motive is assigned in each case for giving the legacy, then the legatee will take one only.

(3.) *Legacies by Portions, and Portions by Legacies.*—The general rule in this case is, that the legatee or portionist shall take one only, and not both; nor does it matter since *Pym v. Lookyer* (5 My. & Cr. 29) whether the will or the settlement comes first, excepting to this extent, that what is due under the settlement is in the nature of a debt, and recoverable accordingly, while what is due under the will (so far as it is in excess of that due under the settlement) is a voluntary bounty only; liable to fail or abate accordingly. There is one curious anomaly connected with satisfaction in this case, viz., that as the word "portion" is applicable to children only, and a bastard is not a child, therefore the bastard takes both the gift under the settlement and that under the will, and is therefore better off than either a child or one in whom the settlor-testator has put himself *in loco parentis*. *Ex parte Pye*, 18 Ves. 140.

SAVING THE STATUTE OF LIMITATIONS. Preventing the operation of the statute. A creditor is said to save the Statute of Limitations when he saves or preserves his debt from being barred by the operation of the statute. Thus, in the case of a simple contract debt, if a creditor commence an action for its recovery within six years from the time when the cause of action accrued, he will be in time to save the statute.

See title **LIMITATIONS, STATUTE OF.**

SAVINGS BANK. All the Acts relating to these institutions were repealed by the stat. 9 Geo. 4, c. 92, and that Act has been in its turn repealed by the stat. 26 & 27 Vict. c. 87, which, together with the stat. 16 & 17 Vict. c. 45, and (as to Post Office Savings Banks) 24 Vict. c. 14, now expresses the law upon the subject. A savings bank is not necessarily a banking company within the meaning of the Joint Stock Companies Acts; nor can a depositor maintain an action against the trustees of the society, but the question must be settled between them by arbitration; and in case of embezzlement, the remedy is by mandamus to compel the trustees and managers to appoint an arbitrator. *Rez v. Mildenhall Savings Bank*, 6 A. & E. 952.

SCANDAL. The words "scandal" and "impertinence" are thus used with reference to pleadings in Equity. Scandal is defined to be anything alleged in a bill, answer, or other pleading, in such language as is unbecoming the Court to hear, or as is contrary to good manners; or any thing set forth which charges some person with a crime not necessary to be shewn in the cause. Impertinence is defined to be the encumbering the records of the Courts with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question. Exceptions might formerly have been taken to pleadings for scandal and impertinence; and such exceptions may still be taken for scandal, but since the Jurisdiction Act, 1852 (15 & 16 Vict. c. 86) s. 17, the practice of excepting for impertinence was abolished, and the only check upon impertinent pleadings is now visiting them with costs. And now under the Judicature Act, 1873, all exceptions are abolished, but the faulty pleading may be objected to by motion in a summary manner.

SCANDALUM MAGNATUM. Scandal, or spreading false reports against peers and certain other great officers of the realm is so called, and is subjected to peculiar punishment by divers ancient statutes. Cowel.

SCHEDULE. A piece of paper or parchment containing a list or inventory of things, usually annexed to deeds and to Acts of Parliament.

SCHOOLS. The schools in England are chiefly of three kinds, viz.: (1.) Grammar Schools; (2.) Proprietary Schools; (3.) Elementary Schools. The first and third varieties are regulated by statutes, the Grammar School Acts beginning with 3 & 4 Vict. c. 77, and ending with 32 & 33 Vict. c. 56; and the Elementary Schools Acts being 33 & 34 Vict. c. 75 (Elementary Education Act, 1870), and some Amendment Acts; the second variety of schools are under the control of the Common Law. And with reference to those Grammar Schools, such as Eton, Rugby, &c., which have acquired the name of Public Schools, two Acts have been recently passed for their government, viz., 31 & 32 Vict. c. 118 (Public Schools Act, 1868), and 35 & 36 Vict. c. 54 (Public Schools Act, 1872). See *Hayman v. Rugby School (Governors)*, L. R. 18 Eq. 28.

SCIENTER. A term used in pleading to signify that part of the declaration which alleges the defendant's previous knowledge of the cause which led to the injury complained of; or rather, his previous knowledge of a state of things which it was his duty to guard against, and his omission to do which has led to the injury complained of. Thus, in an action upon the case for keeping dogs that chased and killed the plaintiff's cattle, that part of the declaration which, after stating that the "defendant wrongfully kept dogs," adds, "knowing them to be accustomed to chase and kill cattle," is termed the *scienter*. The following passage from the judgment of Ellenborough, C. J., in *Jackson v. Peaked* (1 M. & S. 238), furnishes an apt illustration of the use of the word: "In an action for keeping a mischievous bull there was no *scienter* in the declaration; and after a verdict for the plaintiff, the judgment was arrested on that account; and the Court said, 'they could not intend it was proved at the trial; for the plaintiff need not prove more than is in his declaration;' and yet every lawyer is aware that a knowledge of the mischievous nature of the animal is of the essence of such an action, and would therefore never suffer a jury, if he could control them, to find for the plaintiff in such a case, unless such a knowledge in the defendant were proved." See Steph. Pl. 178, 4th edit.; 1 Chit. Pl. tit. "*Scienter*"; 1 M. & S. 238.

SOILIOET (*to wit, that is to say*). A word frequently used in pleadings to point out or particularize that which has been pre-

SCILICET—continued.

viously stated in general terms only. For more particular information with regard to this word, see title **VIDELICET**.

SCIRE FACIAS (*that you make known*).

A *scire facias* is a judicial writ founded upon some matter of record, and requiring the person against whom it is brought to shew cause why the party bringing it should not have the advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated. It is, however, considered in law as an action; and in the nature of a new original. It is used for a variety of purposes, but perhaps one of the most common uses to which it was applied was to revive a judgment after it had become extinct. For all writs of execution must formerly have been sued out within a year and a day after the judgment was entered, otherwise the Court concluded *prima facie* that the judgment was satisfied and extinct, as it is now presumed to be after six years and non-execution; yet, however, it would grant this writ of *scire facias*, which stated the judgment recovered by the plaintiff, and that execution still remained to be had, and commanded the sheriff to make known to the defendant that he should be in Court on the return day, in order to shew why the plaintiff ought not to have execution against him (2 Arch. Pract. 1122). The writ of *scire facias* does not, apparently, now lie for the purpose of reviving a judgment, at least in the usual cases, a writ of revivor or a suggestion on the roll being substituted for it by the C. L. P. Act, 1852, s. 129; however, the writ still lies in the cases referred to in s. 132 of that Act, and also on a judgment against an executor of *assets quando acciderint*, and in some other peculiar cases. Sm. Act. at Law, 292.

SCIRE FIERI. When to a writ of execution issued against an executor or an administrator, the sheriff returns *nulla bona*, the plaintiff, if he can prove a *devastavit*, may sue out a *scire fieri* inquiry, which is a writ directed to the sheriff, commanding him that in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire whether the defendant has wasted the goods of the testator, and if a *devastavit* be found, that he shall warn the defendant that he be in Court upon a day mentioned, to shew cause why the plaintiff should not have a *fieri facias de bonis propriis* against him. 2 Arch. Pract. 1233.

SCOT AND LOT: See title **LOT AND SCOT**.

SCRIVENER. An agent to whom property was intrusted for the purpose of lending it out to others at an interest payable to his principal, and for a commission or bonus for himself, whereby he sought to gain his livelihood. In order to make a man a money scrivener, he must carry on the business of being entrusted with other people's moneys to lay out for them as occasion offers. See Arch. Bank. 36; *Adams v. Malkin*, 3 Cramp. 534, per Gills. C.J.; *Scott and Another v. Melville and Others*, 3 Scott's N. R. 346; 9 Dow, 882.

SCUTAGE (*scutagium*): See title **ESCUTAGE**.

SCUTAGIO HABENDO. A writ that lay for the king or other lord against his tenant, who held by knight-service, to compel him to serve in the wars, or to find a substitute, or to pay scutage. F. N. B. 83; Cowel.

SEA-SHORE. This appears in contemplation of law to belong in property to the sovereign as a *jus privatum*, subject to the *jus publicum*, or public right of the sovereign and people together, to pass and re-pass over it, which latter right is in the nature of an easement (*Att.-Gen. v. Burridge*, 10 Price, 350). The king may grant his private right to a corporation, being *caput portus*, but not so as to prejudice the public right. *Att.-Gen. v. Parmeter*, 10 Price, 378.

In the absence of all other evidence the extent of the Crown's right to the sea-shore landwards is the line of the medium high tide between the springs and the neaps (*Att.-Gen. v. Chambers*, 4 De G. M. & G. 206); and the bed of all navigable rivers where the tide flows and re-flows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation which belongs by law to the subjects of the realm, and of which the right to anchor forms a part; and every grant thereof made by the Crown is subject to such public right of navigation (*Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192), and for which, therefore, the grantee cannot (in the general case) charge anchorage dues. As evidence of such a grant of the sea-shore to the lord of the manor, the exclusive taking of sand, stones, and sea-weed may be called in aid, in the absence of documentary evidence of the grant. *Calmady v. Rowe*, 6 C. B. 861.

If the sea, by gradual and imperceptible progress, encroaches upon the land of a subject, the land thereby covered with water accrues to the Crown (*In re Hull & Selby Railway*, 5 M. & W. 327); and in the case of a like retirement of the sea, the land accrues to the adjoining owner. *Att.-Gen. v. Chambers*, 4 De G. & J. 55.

SECONDARY. An officer of the Court of King's Bench and Common Pleas; so called because he was second, or next to the chief officer. The secondaries of these Courts were abolished by 7 Will. 4 & 1 Vict. c. 30 (1 Arch. Pract. 11). But at the present day there is a law officer in the City of London who bears the name of Secondary.

SECONDARY CONVEYANCES. Conveyances are sometimes divided into primary or original conveyances, and secondary or derivative. The first, as their title imports, are such as do not depend upon any previous conveyance, but are independent and original; the second are such as pre-suppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance; thus an assignment of a lease may be considered a secondary conveyance with respect to the lease itself.

See also title CONVEYANCES.

SECOND DELIVERANCE, WRIT OF. A writ which lies for a plaintiff after he has been non-suited in an action of *replevin*, in pursuance of which the sheriff must again deliver to the plaintiff the goods that were distrained, on his giving security, as he did in the first instance, to re-deliver them, if the distress prove a justifiable one. 2 Arch. Pract. 1087, 1094.

SECRET COMMITTEE. A secret committee of the House of Commons is a committee specially appointed to investigate a certain matter, and to which secrecy being deemed necessary in furtherance of its objects, its proceedings are conducted with closed doors, to the exclusion of all persons not members of such committee. All other committees are open to members of the House, although they may not be serving upon them.

SECTA, or SUIT. By these words were anciently understood the witnesses or followers of the plaintiff.

See also following titles.

SECTA AD CURIAM. A writ that lay against him who refused to perform his suit, either to the County Court or Court Baron. Cowel.

SECTÂ AD MOLENDINUM, WRIT DE. A writ which lay for the owner of a mill against the inhabitants of the place where such mill is situated, for not doing suit to the plaintiff's mill: that is, for not having their corn ground at it.

SECTA REGALIS. A suit so called by which all persons were bound twice in a year to attend in the sheriff's tourn, in order

SECTA REGALIS—continued.

that they might be informed in things relating to the public peace. It was so called because the sheriff's tourn was the king's leet, and it was held in order that the people might be bound by oath to bear true allegiance to the king. Cowel.

SECURITY FOR COSTS. When the plaintiff in a suit resides out of the jurisdiction of the Court in which his suit is pending, or lives abroad, and the defendant is apprehensive that the plaintiff, in the event of being defeated, will evade payment of the costs or expenses of the suit, it is usual for him to apply to the Court to compel the plaintiff's attorney to give security for such payment, and which the Court usually orders to be done, on its appearing that there are good grounds for the application. The security is commonly effected by the plaintiff and two sureties entering into a bond to a sufficient amount to cover the supposed costs of the suit (2 Arch. Pract. 1414). The mere poverty of a plaintiff is, however, no ground for requiring him to give security for costs, unless to a limited extent in some proceedings in tort proper for the County Court, but which the plaintiff chooses to institute in a superior Court (see County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 10). An appellant must invariably give security for costs, but commonly he makes a deposit of money in lieu thereof.

SECURITY FOR GOOD BEHAVIOUR, &c.: See title ARTICLES OF THE PEACE.

SECUS (Lat., *otherwise, not so, the contrary*): See the word used in 1 Man. & Gr. 208, n.

SE DEFENDENDO (*in defending himself*). A plea pleaded by him who is charged with the death of another, to the effect that he was obliged to do what he did in his own defence, otherwise his life would have been in danger. Staunf. Pl. Cor. Lib. 1 c. 7.

See titles HOMICIDE and SON ASSAULT DEMERNE.

SEDUCTION is a tort committed against a parent or master by having sexual intercourse, through persuasion, with his daughter or female servant. The foundation of the action is loss of services; and a parent can only maintain the action if his daughter was in his service at the time. But the slightest degree of service will suffice; and the jury will give damages not at all in proportion to the value of the services, but in proportion to the meanness of the conduct of the seducer,—this excess of damages being awarded as a *solatium* to the feelings of the injured parent, and

SEDUCTION—*continued.*

with which (although it is contrary to the principles of our law) the judge rarely chooses to interfere. When a master sues for the seduction of his servant, he must prove a subsisting contract of service valid in law at the time of the seduction. *Bracegirdle v. Heald*, 1 B. & Ald. 722.

SEIGNIOR (from the Fr. *seigneur*, lord), in its general signification means lord, but in law it is particularly applied to the lord of a fee or of a manor; and the fee, dominions, or manor of a *seignior*, is thence termed a *seignior*, i.e., a lordship. He who is a lord, but of no manor, and therefore unable to keep a Court, is termed a seignior in gross. *Kitchin*, 206; *Cowel*.

SEIGNIORAGE. A privilege or prerogative of the king, by which he claims an allowance in respect of gold and silver brought in the mass to be exchanged for coin. *Cowel*.

SEISED IN DEMESNE AS OF FEE. Is the strict technical expression used to describe the ownership in "an estate in fee simple in possession in a corporeal hereditament." The word "seised" is used to express the "seisin" or owner's possession of a freehold property; the phrase "in demesne" or "in his demesne" (*in dominico suo*), signifies that he is seised as owner of the land itself, and not merely of the seigniorly or services; and the concluding words "as of fee" import that he is seised of an estate of inheritance in fee simple. Where the subject is incorporeal, or the estate expectant on a precedent freehold, the words "in his demesne" are omitted. *Co. Litt.* 17a.; *Fleta*, l. 5, c. 5, s. 18; *Bract*. l. 4, tr. 5, c. 2, s. 2.

SEISIN (*seisina*). Possession of a freehold estate. Upon the introduction of the Feudal Law into England the word "seisin" was applied only to the possession of an estate of freehold, in contradistinction to that precarious kind of possession by which tenants in villenage held their lands, which was considered to be the possession of those in whom the freehold continued. The word still retains its original signification, being applied exclusively to the possession of land of a freehold tenure, it being inaccurate to use the word as expressive of the possession of leaseholds or terms of years, or even of copyholds. To seise signifies to take possession of lands of a freehold tenure by the ceremony of livery of seisin, or delivery of possession; to be seised to be in possession of such land; and the possession of the land itself, which has been acquired by the ceremony of livery of seisin, is thence denominated "seisin" or "seizin." The follow-

SEISIN—*continued.*

ing passage from *Cruise's Dig.* tit. 8, c. 1, s. 10, affords a good illustration of the word: "A tenant for years is not said to be seised of the lands, the possession not being given to him by the ceremony of livery of seisin; nor does the mere delivery of a lease for years vest any estate in the lessee, but only gives him a right of entry on the land; when he has actually entered, the estate becomes actually vested in him, and he is then possessed, not properly of the land, but of the term for years, the seisin of the freehold still remaining in the lessor." It may be observed, however, that the word "seise" is sometimes used in reference to the possession of goods. Thus, in *Taylor v. Fisher* (*Cro. Eliz.* 245, 246), the following passage occurs: "Trespass for breaking his house and taking away a corselet and a pike of the plaintiff. The defendant pleaded that long time before the supposed trespass, J. Bamfield was seised of the said corselet and pike, as of his own goods, &c." See *Watk. Introd. Conv.* by *Morley*; *Coote & Cov.* 7th edit.; pp. 32, 33; 1 *Cru. Dig.* tit. 8, c. 1, s. 10; 2 *C. M. & R.* 41, n. (a.); 3 *Camp.* 116, *per Lord Ellenborough, C.J.*; *Cro. Eliz.* 245.

SEIZING OF HERIOTS. The seizing of heriots, when due on the death of a tenant, is a species of self-remedy, resembling that of taking cattle or goods in distress; excepting that a distress is merely taken as a pledge for other property, whereas a heriot is or becomes the actual property of him who so seizes it.

See title **HERIOT**.

SELECT COMMITTEE: See title **COMMITTEE, SELECT**.

SELF-DEFENCE: See title **SELF-DEFENCE**.

SEMBLE. It would seem; it would appear, &c., e.g., "In assumption on a proviso to manage a farm in a good husbandlike manner, and according to the custom of the country; *semble*, that it is sufficient to assign a breach in the words of the promise." 1 *C. & M.* 89.

SEPARATE DEMISE IN EJECTMENT. A demise in a declaration in ejectment used to be termed a separate demise when made by the lessor separately or individually, as distinguished from a demise made jointly by two or more persons, which was termed a joint demise. No such demise, either separate or joint, is now necessary in this action.

See title **EJECTMENT**.

SEPARATE ESTATE. Property which

SEPARATE ESTATE—*continued.*

a married woman, under certain circumstances, is entitled to retain for her separate and independent use. By the custom of London a married woman may acquire a separate estate by carrying on trade on her own separate account. The right of the wife to the enjoyment of property separately from her husband is usually secured by trustees being appointed on her behalf, to whom the property is conveyed in trust for her sole and separate use; but although no trustees be appointed for the wife, under a limitation to her separate use, Equity would convert her husband into a trustee for her, and she would still be entitled to the enjoyment of the separate estate. And under the stat. 21 & 22 Vict. c. 85, a woman judicially separated from her husband holds her property to her own separate use, and such use continues in case the cohabitation is afterwards resumed. So also under the M. W. P. Act, 1870 (33 & 34 Vict. c. 93) numerous species of property are made the wife's separate estate.

The Court of Chancery, to further secure to married women the enjoyment of separate estate, allows of a restraint upon anticipation, *i.e.*, alienation, to be attached to the property (*Pybus v. Smith*, 3 Bro. C. C. 339); and the operation of that restraint was settled in the case of *Tullett v. Armstrong* (1 Beav. 1) to be this,—that it attaches upon marriage, dis-attaches upon widowhood, re-attaches upon a re-marriage, and so on.

To the extent that a married woman has separate estate she is a *feme sole*; and unless restrained from anticipation she may alienate it by any of those voluntary or involuntary modes by which a *feme sole* or a man may do (*Taylor v. Meads*, 34 L. J. (Ch.) 203; *Matthewman's Case*, L. R. 3 Eq. 787). She may also permit her husband to receive it, and in that case she is entitled to only one year's account of it; and her husband takes all her separate personal estate that is undisposed of at her death, if chuses in possession or chattels real, by his marital right (*Molony v. Kennedy*, 10 Sim. 254), and if chuses in action, by his right as her administrator. *Proudley v. Fielder*, 2 My. & K. 57.

SEQUESTER. As used in the Civil Law signifies to renounce or disclaim, &c. As when a widow comes into Court and disclaims to have anything to do or to intermeddle with her deceased husband's estate she is said to sequester. The word more commonly signifies the act of taking in execution under a sequestration the ecclesiastical goods and chattels of a beneficed clerk or clergyman.

See title SEQUESTRATION.

SEQUESTERARI FACIAS. A writ of execution against a clergyman, directed to the bishop of the diocese in which the defendant resides, commanding the bishop to enter the rectory and parish church, and to take and sequester the same and hold them until of the rents, tithes, and profits thereof, and of other ecclesiastical goods of the defendant, he shall have levied the plaintiff's debt. 2 Arch. Pract. 1284.

SEQUESTRATION. This word, in its most ordinary sense, signifies a kind of execution for debt, and is most frequently used against a beneficed clerk or clergyman. In this case the plaintiff sues out a *fieri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, commanding him to make of the ecclesiastical goods and chattels belonging to the defendant within his diocese the sum mentioned in the writ. This writ is taken to the registrar of the diocese, who thereupon issues a sequestration, which is in the nature of a warrant directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice. Sequestration also issues in Chancery when a defendant has eluded the process of the Court, and a commission of rebellion has been awarded against him to no effect; by virtue of which sequestration his personal estate, and the profits of his real, are seized and detained until the defendant obeys the commands of the Court. A sequestration is also defined to be the separating of a thing in controversy from the possession of both those who contend for it, and in this sense it is considered either as voluntary or necessary; the former being that which is done by the consent of each party, the latter that which is done by the judge of his own authority, whether the parties will or not. The word "sequestration" used also to signify the act of the ordinary in disposing of the goods and chattels of a deceased person whose estate no man would meddle with. It is also used to signify the gathering, collecting, and taking care of the fruits and profits of a vacant benefice for the benefit of the next incumbent. The persons who are appointed to take care of the goods and chattels, or of the rents and profits of lands that are so sequestered, are denominated sequestrators. 2 Arch. Pract. 1284; Cowel.

SÉQUESTRE: *See* title DÉPÔT.

SERIATIM. Severally, separately, individually, one by one: *e.g.*, "Their lordships delivered their judgments *seriatim*." In cases of great importance, or where the judges differ in opinion, it is usual for them to deliver their judgments individually, instead of delegating one with the power

SERIATIM—*continued.*

of delivering the united judgment of the whole Court, and in such cases they are said to deliver their judgments *seriatim*.

SERJEANT, or SERGEANT. There are various officers connected with the law that are denominated serjeants—as serjeant-at-law, serjeant-at-arms, serjeant of the mace, &c. A serjeant-at-law is a barrister of the Common Law Courts of high standing, and of much the same rank as a doctor of law is in the Ecclesiastical Courts. These serjeants seem to have derived their title from the old knights templars (amongst whom there existed a peculiar class under the denomination of *frères "sergens,"* or *fratres serviientes*), and to have continued as a separate fraternity from a very early period in the history of the legal profession. The barristers who first assumed the old monastic title were those who practised in the Court of Common Pleas, and until a very recent period (the 25th of April, 1834, 9 & 10 Vict. c. 54) the serjeants-at-law always had the exclusive privilege of practice in that Court. Every judge of a Common Law Court previous to his elevation to the bench used to be created a serjeant-at-law; but since the Judicature Act, 1873, this is no longer necessary. Amongst all the serjeants, judges, and others, the practice is to address each other by the familiar epithet of "brother." A serjeant-at-arms is an officer connected with the House of Commons, whose duty it is to keep the doors of the House, and also to apprehend and to take into custody any offender whom the House may commit to his charge. There is a similar officer connected with the House of Lords. There is also a serjeant-at-arms belonging to the Court of Chancery, whose duty it is to apprehend such persons as are guilty of contempt of Court, &c. Serjeants of the mace are a kind of inferior officers who attend the mayor or other head officer in the city of London and other corporate towns. Cowel; Addison's *Knights Templars*, 318; *The Serjeants' Case*, 6 Bing. N. C. 235; Fortesc. c. 50.

SERJEANT-AT-ARMS is the title of an officer in each of the two Houses of Parliament. His duties in the House of Lords are to attend upon the Chancellor with the mace, and to execute the orders of the House for the apprehension of delinquents; and in the Commons this officer attends upon the Speaker with the mace, carries messages from the bar to the table, and executes the orders of the House with respect to delinquents to be taken into custody for breaches of its privileges.

SERJEANTY. A species of tenure by

SERJEANTY—*continued.*

knight service, which was due to the king only, and was distinguished into grand and petit serjeanty; the tenant holding by grand serjeanty was bound, instead of serving the king generally in his wars, to do some honorary service to the king in person, as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer at his coronation. Petit serjeanty differed from grand serjeanty in that the service rendered to the king was not of a personal nature, but consisted in rendering him annually some small implement of war—as a bow, a sword, a lance, an arrow, or the like (Cowel). Both these species of tenures were spared at the general abolition of feudal tenures in 1660 (12 Car. 2, c. 24); and the estates of Strathfieldsaye (Duke of Wellington) and Blenheim (Duke of Marlborough) are examples, perhaps the only examples, at the present day of the tenure by petit serjeanty.

SERVICE. The consideration which the feudal tenants were bound to render to their lords in recompense for the lands they held of him. This service in original feods was only twofold; to follow, or do suit to their lord, in his courts in time of peace, and in his armies or warlike retinue in times of war. Generally, however, these services varied much; some being of a personal nature, others not; some of an honourable, others of a menial or servile character. Britton, c. 66.

SERVICE OF WRITS, &c. The service of writs, summonses, rules, &c., signifies the delivering or leaving them with the party to whom, or with whom they ought to be delivered or left; and when they are so delivered they are then said to have been served. Usually a copy only is served, and the original is shewn. Various periods of time are limited for the service of particular process; and those periods cannot in the general case be exceeded. Usually the service must be personal, but in cases of peculiarity substituted service may be made with the leave of the Court.

See title **SUBSTITUTED SERVICE**.

SERVICES FONCIERS. These are in French Law the easements of English Law.

SERVIENT TENEMENT. In the law of easements the tenement whose owner as such is subject to an easement enjoyed by an adjoining tenement, is called by this name.

See title **EASEMENTS**.

SERVITIUM LIBERUM. A sort of free or liberal service which certain feodatory tenants, called *liberi homines*, were bound

SERVITIUM LIBERUM—*continued.*

to perform. And as these tenants themselves were different from vassals, so were their services of a more honourable nature; as to attend the lord's Court, to find a man and horse to go with the lord into the army, and such like. Cowel.

SERVITIUM REGALE. Royal service, or the rights and prerogatives of manors which belong to the king as lord of the same, and which were generally reckoned to be six; viz., (1), power of judicature in matters of property; (2), power of life and death in felonies and murders; (3), a right to waifs and strays; (4), assessments; (5), minting of money; and, (6), assize of bread, beer, weights, and measures. Cowel.

SERVITORS OF BILLS were messengers of the marshal of the King's Bench, who were sent to serve bills or writs to summon men to Court. They are now more commonly called tipstaves. 2 Hen. 4, c. 23; Cowel.

See title **TIPSTAFF**.

SERVITUDE, in its original and popular sense, signifies the duty of service, or rather the condition of one who is liable to the performance of services. The word, however, in its legal sense, is applied figuratively to things. When the freedom of ownership in land is fettered or restricted, by reason of some person, other than the owner thereof, having some right therein, the land is said to serve such person; the restricted condition of the ownership, or the right which forms the subject-matter of the restriction, is termed a servitude; and the land so burdened with another's right is termed a servient tenement, while the land belonging to the person enjoying the right is called the dominant tenement (see titles **DOMINANT AND SERVIENT TENEMENTS**). The principles with regard to servitudes, and the terms employed in treating of them, are borrowed from the Roman Law. In the language of the Roman Law, a thing is said to be servient in which, although it is owned by another, we have a real right, by virtue of which, and for the advantage of our person or property, we can require the owner, or any possessor of the thing, to suffer, or omit to do something with respect to such thing, which he would not have to submit to if the rights which constitute ownership remained in himself undiminished. Servitude is therefore a *jus in re*, as distinguished from a *jus ad rem*; the former is a real right, or a right in the thing itself, and consequently has effect against every third person; while the latter is a personal right, or a right to the thing, and hence applies only against the

SERVITUDE—*continued.*

actual obligee. If my neighbour burthens his land for the benefit of my land, with the *servitus compascui*, or with the *servitus ne luminibus officiatur*, I have in each of these cases a *jus in re*, and every holder of the land must suffer me to pasture my cattle on it, and he must abstain from erecting anything on his ground, or doing anything to it whereby my light would be injured. The word "servitude" may be said to have both an active and a passive signification: in the former sense denoting the restrictive right belonging to the entitled party; in the latter, the restrictive duty entailed upon the proprietor or possessor of the servient land.

See also title **EASEMENTS**.

SESSION. The sitting of the justices in Court by virtue of their commission. There are various kinds of sessions, viz., (1). Session of Parliament; (2), Great Session of Wales; (3), Session of Gaol Delivery; (4), Session of the Peace. These will be explained in their order: (1.) Session of Parliament signifies merely the sitting of Parliament, in order to transact the business of the State. (2.) The Great Session of Wales was a session or Court held in Wales twice in every year, similar to our assizes; these sessions, however, were abolished by the 1 Will. 4, c. 70, and the judges now go the circuits in Wales and Cheshire the same as in the English counties. (3.) Session of Gaol Delivery was a session held for delivering a gaol of the prisoners therein confined. (4.) Session of the Peace. This is a Court of record, and is held before two or more justices of the peace, one of whom must be of the quorum (see title **QUORUM**). The jurisdiction of this Court, by stat. 34 Edw. 3, c. 1, extended to the trying and determining all felonies and trespasses whatsoever, although they seldom, if ever, try any greater offence than small felonies. There are three different kinds of sessions held by justices of the peace: (a.) General sessions, which may be held at any time of the year for the general execution of the authority of the justices; (b.) The general quarter sessions, which are held at four stated times in the year; and (c.) A special or petty sessions, which may be holden on any special occasion for the execution of some particular branch of the authority of the justices. 2 Hale, P. C. 42; Tomlins.

SESSIONAL ORDERS. These are certain resolutions which are agreed to by both Houses at the commencement of every session of Parliament, and have relation to the business and convenience thereof; but they are not intended to continue in force beyond the session in which

SESSIONAL ORDERS—continued.

they are adopted. They are principally of use as directing the order of business.

SESSIONS FOR WEIGHTS AND MEASURES.

A session in London, which may be held before four justices, selected from the mayor, recorder, and aldermen (of which the mayor or recorder must be one), to inquire into the offences of selling by false weights and measures, contrary to the statutes, and to receive indictments, punish offenders, &c. Cunningham.

SET. This word appears to be nearly synonymous with the word "lease." When used as a verb, it would seem to convey the same meaning as "to lease." A lease of mines is frequently termed a "mining set."

SET-OFF. A demand which the defendant in an action sets up against the plaintiff's demand, so as to counterbalance that of the plaintiff, either altogether or in part. As if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself from the plaintiff, for merchandise sold to the plaintiff; and if he pleads such set-off in reduction of the plaintiff's claim, such plea is termed a plea of set-off. A set-off may therefore be defined to be a claim which a defendant has upon a plaintiff, and which he sets up or places against the plaintiff's demand.

The leading principles of set-off are the following:—1st. At Law, there was no set-off in case of mutual unconnected debts, until the Statutes of Set-off, 2 Geo. 2, c. 22, and 8 Geo. 2, c. 24, permitted it in the case of the bankruptcy of either debtor; but as to connected accounts, the balance was in the general case recoverable at Law. 2dly. In Equity, these Courts generally follow the rules of the Common Law in allowing or in refusing a set-off, but they allow a set-off in the following further cases,—(a.) In the case of mutual independent debts, contracted upon the faith of a mutual credit (*Lanesborough v. Jones*, 1 P. Wms. 326); (b.) In the case of cross demands admitting a set-off at Law, but of which the one or both are of an equitable nature; and even (c.) In the case of cross demands arising in different rights, but in this last case only under circumstances of particularity, e.g., of fraud. *Ex parte Stephens*, 11 Ves. 24.

SETTLEMENT, ACT OF. The stat. of 12 & 13 Will. 3, c. 2, by which the Crown was limited to the house of Hanover, and some new provisions were added at the same time for the better securing our religion, laws, and liberties.

See also title SUCCESSION TO THE CROWN.

SETTLEMENT, DEED OF. A deed made for the purpose of settling property, i.e., arranging the mode and extent of the enjoyment thereof. The party who settles property is called the settlor; and usually his wife and children, or his creditors, or his near relations, are the beneficiaries taking interests under the settlement.

It may be either a marriage settlement, and in that case either a settlement of real estate or a settlement of personal estate; or it may be a trust deed in favour of creditors, or it may be a voluntary settlement.

See each of these several titles.

SETTLEMENT OF PERSONAL ESTATE.

This is a settlement usually made upon marriage, either a marriage to follow, or one which has already taken place. It is a deed of trust; and usually the first trusts (after providing for the investment of the trust funds) relate to the destination of the income during the lives of husband and wife, and that of the survivor of them. When the property put into settlement is contributed by the husband, the first life interest is in general given to him; on the other hand, where the property is contributed by the wife, the first life interest is invariably given to her own separate use without power of anticipation; but it is competent to the wife to allow the husband to receive the income without account. After the decease of both husband and wife, the ordinary trusts of the settlement are for the children or remote issue of the marriage as the husband and wife or the survivor shall appoint; and in default of, or subject to, any such appointment, then in trust for the children equally, sons taking a vested, i.e., transmissible, share at twenty-one, daughters the like at twenty-one or marriage, whichever is the earlier event; and in case of a failure of children or remote issue of the marriage living to attain a vested interest, the trust property is usually made to revert to the party who has contributed the same. The settlement usually contains special provisions regarding the maintenance, education, and advancement of the children of the marriage, as to which see these titles. Very generally, it also contains a covenant to bring into settlement the after-acquired property of the wife (exceeding a certain value, which varies according to the wealth of the parties).

SETTLEMENT OF REAL ESTATE.

This, also, is usually a deed of trust made in contemplation of marriage; but it differs from a settlement of personal estate in this respect, that the limitations of real estate may be made without the intervention of trustees, whereas there can be no partial estate, but only the absolute interest in

SETTLEMENT OF REAL ESTATE—cont.

personal estate at Law, and such latter estates are only good in Equity.

A settlement of real estate may be either a strict settlement, as it is called, or one that is not strict. The latter kind of settlement is made where it is desired to settle the land in such a way as that the children shall take equally, and the proper mode of attaining that object is by conveying the land to trustees in trust for sale, such trust being made exercisable during the lives of the tenants for life with their consent only, and afterwards at the sole discretion of the trustees, and the proceeds to arise from the sale are then settled as personal estate (see title **SETTLEMENT OF PERSONAL ESTATE**), with a proviso that until sale the rents and profits shall be paid and applied in the same manner as the income of the proceeds would be applicable if a sale had been already made. On the other hand, if the real estate (being an old family estate, or for any other reason) is to be settled strictly, the general form and contents of the settlement are as follows:—The first testatum contains a grant of the freehold property to the general trustees (grantees to uses) to the use of the settlor until the marriage, and thereafter to the use of pin-money trustees for a term of ninety-nine years, and subject thereto to the use of the settlor for life, remainder to the use that the wife surviving her husband shall receive a jointure rent-charge during her life, and subject thereto to the use of jointure trustees for a term of 200 years, and subject thereto to the use of portion trustees for a term of 600 years, and subject thereto to the use of the first and other sons of the marriage successively in tail male, [with remainders to the use of the husband's younger brothers for life, and to their respective issues in tail male in succession, with remainder to the first and other sons of the intended husband in tail, with the like remainder to his daughters in tail, with remainder to the first and other sons of the husband's brother in tail, with remainder to the first and other daughters of the same brothers in tail], with remainder to the right heirs of the settlor. The limitations within the square brackets are often omitted, or are left to be subsequently settled by the remainderman in fee, or by the first tenant in tail. The settlement ought also to contain the following usual clauses:—

- (1.) Maintenance and education clause;
- (2.) Advancement clause;
- (3.) Provisions for the raising of portions;
- (4.) Provisions for the application of rents during minorities;
- (5.) Power for the husband to charge the premises with a gross sum;

SETTLEMENT OF REAL ESTATE—cont.

- (6.) Power for him to charge an additional rent-charge for his intended wife;
- (7.) Power for him to jointure any future wife, and to charge portions for his children by her;
- (8.) General powers of managing estate, according to its nature, by granting mining, agricultural, or other leases, subject to certain restrictions;
- (9.) Powers of sale and exchange;
- (10.) Powers of enfranchisement and partition;
- (11.) Provisions for the application of the moneys received upon any sale, exchange, enfranchisement, or partition;
- (12.) Power to general trustees to give receipts for such last-mentioned moneys; and
- (13.) Power of appointing new trustees;

Where the settled property comprises freeholds, copyholds, leaseholds, and heirlooms, or general personal estate, there is usually a separate testatum for each of these species of property; and the settlor gives the usual covenants on the part of a vendor, a settlement being in the nature of a purchase-deed.

SETTLEMENT, POOR LAW. The right, depending on various circumstances, which entitles a pauper to be maintained by a particular locality, whether parish or union, is called his settlement. In the case of a married woman, her settlement follows that of her husband, assuming the marriage to have been legal (*Chinham v. Preston*, 1 W. Bl. 192); but if her husband has no settlement she retains her maiden settlement (*Rex v. St. Botolph*, Burr. S. C. 367). With reference to children (a), if legitimate, the place of their birth is *prima facie* the place of their settlement, such settlement continuing so long as the child remains a member of the family (*Rex v. Bleasby*, 3 B. & A. 377); and (b), if illegitimate, the mother's settlement is that of the child (4 & 5 Will. 4, c. 76, s. 71). Domestic servants used to acquire a settlement by one year's uninterrupted service in the same service, but such is not now the effect of service (4 & 5 Will. 4, c. 76, s. 64). Being an apprentice and inhabiting in any town or place makes that place the settlement of the child (3 W. & M. c. 11, s. 8; *St. Pancras v. Clapham*, 2 El. & El. 742). Also renting a tenement of the yearly value of £10 and paying poor rates for one year, confers a settlement, under 35 Geo. 3, c. 101, and 4 & 5 Will. 4, c. 76. Also acquiring property at the purchase price of £30 or upwards, appears to confer

SETTLEMENT, POOR LAW—*continued.*

a settlement in the place where the property is situated; but residence in the place seems to be also necessary.

See also title **POOR**.

SEVERAL COVENANT.

A covenant by two or more persons severally, and not jointly, so that they are severally or separately bound by it. 5 Rep. 23.

See title **COVENANT**.

SEVERAL FISHERY: See title **FISHERY**.**SEVERAL INHERITANCE.**

An inheritance conveyed in such manner as to descend or come down to two or more persons severally, and not jointly, by moieties. Cunningham.

SEVERAL TAIL.

An entail severally to two: as if land is given to two men and their wives and to the heirs of their bodies begotten; here the donees have a joint estate for their two lives, and yet they have a several inheritance, because the issue of the one shall have his moiety, and the issue of the other the other moiety. Cowel.

SEVERALTY.

A person is said to hold lands in severalty when he is the sole tenant thereof, and holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.

SEVERANCE.

Singling, dividing, disjoining. Thus, in pleading, when there are several defendants in an action they may either all plead jointly one and the same defence, or each defendant may plead a separate defence for himself if he thinks such a course preferable; in which latter case he is said to "sever," and the subject generally is termed "severance in pleading." When, however, defendants have once united in the plea—that is, have pleaded a joint defence, they cannot afterwards sever at the rejoinder, or any other later stage of the pleadings. The word "severance" is also used to signify the cutting of the crops, such as corn, grass, &c. F. N. B. 78; Steph. Pl. 235, 4th ed.; 4 B. & C. 764.

SEWERS, COMMISSIONERS OF.

The Court of Commissioners of Sewers is a temporary tribunal erected by virtue of a commission under the great seal. Its jurisdiction is to overlook the repairs of sea-banks and sea-walls, and the cleansing of rivers, public streams, ditches, and other conduits, whereby any waters are carried off; and is confined to such county or particular district as the commission expressly names.

See also title **METROPOLITAN SEWERS**.

SHERIFF (from the Saxon *scir-gerefa*).

A sheriff is the principal officer in every county, and has the transacting of the public business of the county. He is an officer of great antiquity, and was also called the shire-reve, reve, or bailiff. He is called in Latin *vicecomes*, as being the deputy of the earl or comes, to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, on account of their high employments and attendance on the king's person, not being able to transact the business of the county, were relieved of that burden, reserving to themselves the honour, but the labour was laid on the sheriff, who now, therefore, does all the king's business in the county. The office of sheriff lasts for one year, and his duties, which are very numerous and important, are commonly performed by his deputy, called an under-sheriff. The duties principally consist in executing writs, precepts, warrants from justices of the peace for the apprehension of offenders, &c. He was also empowered to act as judge in the County Court (or Sheriff's Court, as it was sometimes called), where actions were brought for the recovery of sums under £20: and to the present day the City of London Court, which is a County Court, is the same as the Sheriff's Court. But by recent statutes (for which, see title **COUNTY COURT**), a new organization of County Courts has been provided, and which has little or no connection with the sheriff, a special officer (called the County Court Judge) presiding over each County Court.

Under the statute 28 Edw. 1, st. 3, c. 8, the election of the sheriffs of the county belonged to the freeholders of the county assembled in the County Court; but by the subsequent statute, 9 Edw. 2, st. 2, the right of election was vested in (perhaps restored to) the Crown, who made the election through its chancellor, justices, &c. By the statute 14 Edw. 3, st. 1, c. 7, it was enacted that the sheriffs of every county should be annually re-elected at the Exchequer; and the practice at the present day is regulated by the last-mentioned Act.

SHERIFF'S COURT.

The Court held before the sheriff's deputy—that is, the under-sheriff, and wherein actions are brought for recovery of debts under £20; writs of inquiry are also brought here to be executed. The Sheriff's Court for the county of Middlesex is that in which damages are assessed in proper cases after trial at Westminster.

SHERIFF'S TOWN.

The sheriff's

SHERIFF'S TOURN—*continued.*

tour, or rotation, is a Court of record, held twice every year before the sheriff in different parts of the county; being indeed only the turn of the sheriff to keep a Court Leet in each respective hundred. 4 Inst. 259; 2 Hawk. P. C. 55.

SHEW CAUSE, RULE TO: See title **RULE**.

SHIFTING USE: See title **USE**.

SHIP-MONEY. An ancient imposition, which, after having lain dormant for many years, was attempted to be revived by King Charles I., in 1635 and 1636, and his attempt to revive which was adjudged legal in the great *Case of Ship-money* (3 St. Tr. 825). It consisted of a tax levied on all the ports, towns, cities, boroughs, and counties of the realm for providing and fitting out ships of war for the king's service (Cowel; 17 Car. 1, c. 14). The tax was subsequently resolved in Parliament to be illegal, or, at all events, unconstitutional.

SHIPPING. In the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), numerous provisions are contained regarding the entire subject of merchant shipping, including their registration, building, tonnage, ownership, and national character; also, regarding the seamen on board of them and their masters and commanders; also, regarding ship-brokers and ship-agents, pilots, &c.; also, regarding the sale or transfer and mortgage of merchant vessels, and regarding freight, charter-parties, demurrage, salvage, towage, collisions, &c. For particular information regarding these various matters, consult the various titles, and also the following titles, **BILL OF LADING; BOTTOMRY; RESPONDENTIA; COURT OF ADMIRALTY; and PRIZE**; also, **NAVIGATION**. And see generally **Kay on Ship-masters**.

SHIRE-MOTE. The assizes of the shire, or the assembly of the people, was so called by the Saxons. It was nearly, if not exactly, the same as the *Seyr-gemote*, and in most respects corresponded with what were afterwards called the County Courts.

See titles **COURTS OF JUSTICE; COUNTY COURTS**.

SHORT CAUSE IN CHANCERY. Is a cause which is not likely to occupy a great portion of the time of the Court, and which may be entered in the list of "short causes," set apart for the purpose, upon the application of one of the parties and a certificate of his counsel that the cause is a proper one to be heard as a "short cause." If both the parties consent to the

SHORT CAUSE IN CHANCERY—*cont.*

speedy decision of the suit, the cause is heard as a "consent cause"; but if one refuses to consent, and throws obstacles in the way of its speedy decision, it may, but only if from its nature it is a proper case to be heard as a short cause, be still heard more speedily than it would be in its regular course by its entry as a "short cause" (11 Sim. 51; 2 Keen, 671; 1 Keen, 464; 2 M. & C. 452). At the present day the difference between a short cause and a consent cause is practically non-existent. 1 Dan. Ch. Pr. 800.

SI FECERIT TE SECURUM. One of the species of original writs, and which was so called from the words of the writ, which directed the sheriff to cause the defendant to appear in Court without any option given him, "*provided the plaintiff gave the sheriff security*" effectually to prosecute his claim.

SI NON OMNES. A writ of association of justices, by which if all in commission cannot meet at the day assigned it is allowed that two or more of them may finish the business. And after the writ of association it is usual to make out a writ of *si non omnes*, directed to the first justices, and also to those who are associated to them; which, after reciting the purport of the two former commissions, commands the justices that if all of them cannot conveniently be present, such a number of them may proceed, &c. F. N. B. 111; Cowel; Tomlins.

SIDE BAR RULE: See title **RULE**.

SIDESMEN. Or, as they were likewise termed, synodsmen, were originally persons whom, in the ancient episcopal synods, the bishops were wont to summon out of each parish to give information of the disorders of the clergy and people. These in the process of time became standing officers, under the title of sidesmen, synodsmen, or questmen. The whole of their duties seems now to have devolved by custom upon the churchwardens of a parish. Cripps' Laws of the Church and Clergy, 180.

SIGNIFICAVIT. Was that clause of the writ *de contumace capiendo* which stated that a certain judge or other competent person had "signified" to the king that he against whom the writ was issued was "manifestly contumacious." It was in the following form:—"William the Fourth by the grace of God," &c., "to the sheriff of—shire, greeting: Sir John Nicholl, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury,

SIGNIFICANT—*adjective*.

being significant, has signified to us that the A. B. Esq. C.—in the county of —, is maliciously exercising the "significavit" with intention in other words of literature. Sometimes it is written which contained the name was termed a "significavit." See *Law v. Roberts*, 1 A. & E. 557.

See also title EXCOMMUNICATIO CANONICA.

SIGN MANUAL. The signature or subscription of the king is termed his sign manual. There is this difference between what the sovereign does under the sign manual and what he or she does under the great seal, viz., that the former is done as a personal act of the sovereign, the latter as an act of state.

SIGNING JUDGMENT. Is the act of entering the judgment, which either the plaintiff or defendant has obtained in an action. Judgments, like the pleadings, were formerly pronounced in open Court, and are still always supposed to be so. But by a relaxation of practice, there is now, in general, except in the case of an issue in law, no actual delivery of judgment either in Court or elsewhere. The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to judgment, obtains the signature or allowance of the proper officer of the Court, expressing generally that judgment is given in his favour, and this is called signing judgment, and stands in the place of the actual delivery thereof by the judges themselves. And sometimes the officer only grants his permission to sign; for it has been stated that the signing of the judgment is but the leave of the master of the office for the attorney to enter the judgment for his client. *Style's Prac. Reg.* title "Judgment;" *Steph. Pl.* 122, 5th ed.

SILK GOWN. Is the professional robe worn by those barristers who have been appointed of the number of Her Majesty's counsel, and is the distinctive badge of Queen's counsel, as the stuff gown is of the "juniors" who have not attained that dignity. Accordingly, when a barrister is raised to the degree of Queen's counsel, he is said to have "got a silk gown." The right to confer this dignity resides with the Lord Chancellor, who disposes of this branch of his patronage according to the talents, the practice, the seniority, and the general merits of the junior counsel.

SIMILITER. That set form of words used by the plaintiff or defendant in an action by which he signifies his acceptance of the issue tendered by his opponent.

SIMILITER—*adverb*.

When simply added to the adversary's position, meaning the tender of issue, it is in the following form:—"And the plaintiff for defendant, as the case may be, with the issue." When instead of being simply added to the pleading as above explained, it is delivered to the opposite party as a separate instrument, it then runs in the following form:—"And the plaintiff as to the plea of the defendant by me above pleaded and whereof he hath put himself upon the country, doth the like," and in this case it is called a "special similiter." The use of the *similiter* is only applicable to issues of fact which are triable by the country (i.e. a jury). It occurs, says Mr. Sergeant Stephen, to mark the acceptance both of the question itself and the mode of trial proposed, although originally it seems to have been introduced with the view to the latter point only. The resort to a jury in ancient times could in general be had only by the mutual consent of each party. It appears to have been with the object of expressing such consent that the *similiter* was in those times added in drawing up the record; and from the record it afterwards found its way into the written pleadings. Accordingly, no *similiter* or other acceptance of issue is necessary, when recourse is had to any of the other modes of trial (*Steph. Pl.* 265, 266, 4th ed.). By the C. L. P. Act, 1852, s. 79, either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon; and in all cases where the plaintiff's pleading is in denial of the pleading of the defendant, or some part of it, the plaintiff may add a joinder of issue for the defendant. Joinder of issue in this last case is therefore equivalent to adding the *similiter* for the defendant. *Sm. Act.* at Law, 88.

SIMONY. The corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward, and any resignation or exchange for money, is corrupt, however fair the transaction may appear to be. It is said to be called "Simony" from the resemblance it bears to the sin of Simon Magus (3 *Inst.* 156). As to what amounts to a corrupt presentation within the intent of the Law, see *Fox v. Bishop of Chester* (*Tud. L. C. Conv.* 190), and *stats.* 12 Anne, st. 2, c. 12, and 3 & 4 Vict. c. 113. Generally the living must be full at the time of the sale, in order that the sale of the presentation may be free from corruption; and bonds of resignation are subjected to restraint by the *stat.* 9 Geo. 4, c. 94, which requires them to be made only in favour of certain relations by blood or marriage, e.g., uncle, son, brother, nephew, &c., of the patron or his wife.

SIMPLE CONTRACT. The word "simple," as applied to contracts, is used in contradistinction to special; the former including all such contracts as are entered into either verbally or by writing not sealed, that is, by any instrument not under seal (as it is termed); the latter comprehending such contracts as are entered into by the parties in writing and subscribed to by their affixing their seals to the same; and which are thence termed contracts under seal. The former species of contract are called simple, because they subsist by reason simply of the agreement of the parties, or (as some say) because their subject matter is usually of a more simple or of a less complex nature. The latter species are called special from the same obvious reasons, viz., that the subject matter is usually of a more important or special character; hence also the reason for the former being merely verbal or written, and the latter always being in writing and sealed with the seal of the party in testimony of his assent to the subject matter of the contract. In point of form contracts are threefold, by parol, by specialty, and by matter of record. All contracts are called parol, unless they be specialties (that is, deeds under seal) or be matter of record. A written agreement not under seal is classed as a parol or simple contract, and is usually considered as such just as much as any agreement by mere word of mouth. For at Common Law there is no such class of contracts as contracts in writing contradistinguished from those by parol or specialty. If they are merely written, and not specialties, they are parol. Bonds, deeds, and the other contracts under seal are called specialties; and being of a higher order than contracts by parol, require, as was before observed, greater solemnity and accuracy in order to render them valid. Contracts by matter of record, and which are the highest kind of contracts, are such as judgments, recognizances of bail, statutes merchant, &c., and other securities of the same nature, entered into with the intervention of some public authority, as before a Court of record or a judge thereof, &c.

See further title **CONTRACTS**.

SIMPLE LARCENY: See title **LARCENY**.

SIMPLICITER. Simply, directly, immediately, as distinguished from inferentially or indirectly, &c., e. g.: "No doubt the notice (by a carrier that he will not be responsible for loss or damage to valuable goods, unless the bailor will pay a higher than ordinary rate of insurance for their carriage) operates as a limitation of liability; but the question is in what way? *simpliciter*? or as the foundation of a special contract?" *Per Parke, B., in Wild v. Pickford*, 8 M. & W. 452.

SINECURE. When a rector of a parish neither resides nor performs duty at his benefice, but has a vicar under him endowed and charged with the cure thereof, this is termed a "sinecure." And when a church has fallen down, and the parish becomes destitute of parishioners, it is said to have become a sinecure. *Wood's Inst.* 153.

SINE DIE (*without day*). When judgment is given for the defendant in an action, it is said *eat inde sine die* (let him go thereof without day), that is, he is discharged or dismissed out of Court.

See also title **EAT INDE SINE DIE**.

SINGLE BOND. A bond is called single when there is no condition added to it that if the obligor does some particular act the obligation shall be void, &c.

See title **BOND**.

SINGLE DEMISE IN EJECTMENT. A declaration in ejectment might have contained either one or several demises; when it contained only one, it was said to be a declaration with a single demise. It was essential to the maintenance of an action of ejectment, that he who was alleged as making the demise should have had the legal estate in the premises sought to be recovered; and hence, whenever a doubt existed as to whether the legal estate was in one of the several persons, it was usual in framing the declaration to insert a demise by each, in which case the declaration was said to contain several demises; and the action was then entitled "John Doe on the several demises of A., B., and C.," naming the several lessors (see also title **DEMISE**). But now under the C. L. P. Acts, 1852 and 1860, a new method of proceeding in ejectment is provided, in which no demise at all is necessary, but the action proceeds against the actual tenant in possession as nearly as may be in accordance with the rules in other actions.

See title **EJECTMENT**.

SITTINGS: See title **BANC**; also **NISI PRIUS**.

SITTINGS AT NISI PRIUS: See title **NISI PRIUS**.

SITTINGS IN BANC: See title **BANC**.

SIX CLERKS. Officers belonging to the Court of Chancery, whose duties consisted in receiving and filing all bills, answers, replications, and other records in all causes on the Equity side of the Court of Chancery. They signed all copies of pleadings made by the sworn clerks and waiting clerks, after seeing that the originals were regularly filed. They examined and signed doquets of decrees and dismissals prepared for enrolment, and saw that

SIX CLERKS—continued.

the records and orders were duly filed and entered, &c. They had the care of all records in their office, which remained in their studies for six terms, for the sworn clerks and waiting clerks to resort to without fee, &c. (Smith, Ch. Pr. 25). But now by General Orders I, 35, the clerks of records and writs are to perform all such duties as used to be performed by the six clerks, sworn clerks, or waiting clerks as officers of the Court, in relation to the filing, copying, and amending of all bills, demurrers, pleas, answers, and other pleadings and records; and in relation to the entrance of appearances, consents, notes, and memorandums of services; the certifying of appearances, the custody of exhibits, the enrolment of decrees, and other such like proceedings.

SLANDER. The malicious defamation of a man with respect to his character, or his trade, profession, or occupation, by word of mouth; the same as a libel is by writing or other significant characters (3 Chitty's Bl. 123, and Starkie on Libel and Slander). Unless where the words are spoken of a person in respect of his trade, profession, or occupation, it is necessary to prove special damage, and also to allege the same in the declaration.

See title **LIBEL**.

SLANDER OF TITLE. This is a statement of something tending to cut down the extent of title to some estate vested in the plaintiff. Such statement, in order to be actionable, must be false and malicious, *i.e.*, both untrue and done on purpose to injure the plaintiff. Further, damage must also have resulted from the statement according to the general rule in cases of *Slander*, see that title.

SLAUGHTER-HOUSE: See title **HEALTH, PUBLIC**.

SLAVERY: See title **VILLENAGE**.

SLEEPING RENT. An expression frequently used in coal mine leases and agreements for same. It would seem to signify a fixed rent as distinguished from a render, or rent varying with the amount of coals gotten. See *Jones, v. Shears*, 6 M. & W. 429.

SLIP. Is that part of a police-court which is divided off from the other parts of the court for the prisoner, or party charged with any offence, to stand in. It is frequently called the dock.

SMUGGLING. Importing goods which are liable to duty so as to evade payment of duty. Such goods may be seized, and the vessel forfeited; and every person on

SMUGGLING—continued.

board such vessel is liable to a penalty of £100. The price of smuggled goods cannot be recovered in an action. *Thomson v. Thomson*, 7 Ves. 493.

SOC (soca). Power or liberty of jurisdiction, whence the word *soca*, signifying a seigniority enfranchised by the king with liberty of holding a court of sokemen or socagers, *i.e.*, tenants, whose tenure is said by some to have been thence called socage. Bract. lib. 3, tract 2; Cowel.

SOCAGE (from the Fr. *soc*, a plough-share). Socage tenure is the holding of lands in consideration of certain inferior services of husbandry to be performed by the tenant to the lord of the fee. Socage in its most general and extensive signification seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to tenure by chivalry or knight service, where the render was precarious and uncertain. Socage is of two sorts—free socage, where the services are not only certain but honourable; and villein socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are also called in Glanvil and other authors by the names of *liberi sokemanni*, or tenants in free socage. Cowel; Bract. lib. 2, c. 35. By the stat. 12 Car. 2, c. 24, all the tenures by knight service were, with one or two immaterial exceptions, converted into free and common socage.

SOCAGERS. These, who were called also *Sokemans*, *Sokemans*, or *Socmen*, were tenants who held their lands by socage tenure. The *ceorles*, or husbandmen, among our Saxon ancestors were of two sorts, one that hired the lord's out-land or tenementary land, like our farmers; and the other that tilled or manured his in-land or demesnes (yielding work, not rent), and were, therefore, called *soc-men* or plough-men. But after the Conquest the proper *sokemanni*, or *sokemanni*, were those tenants who held by no servile tenure, but commonly paid their rent as a *soke*, or sign of freedom, to the lord, though they were sometimes obliged to perform customary duties for the service and honour of their lord. Cowel; *Les Termes de la Ley*.

SOCIÉTÉ. In French Law is the *so* *cietas* of Roman Law and the *partnership* of English Law. Every *société* is either

- (1.) *Universelle*; being either
 - (a.) Of all present property; or,
 - (b.) Of all future gains; or,
- (2.) *Particulière*; being a particular contract for one definite enterprise.

SOCIÉTÉ—continued.

Generally, the modes and consequences of a dissolution of a *société* are the same as for that of a partnership in English Law.

See title PARTNERSHIP.

SODOMY. The crime of having unnatural intercourse with a male human being, or, *semble*, a female person; or with a brute animal.

See also title BUGGERY.

SOLE CORPORATION: See title CORPORATION.

SOLE TENANT. He who holds lands in his own right without any other being joined. Kitchen, 134; Cowel.

SOLICITOR. A legal practitioner in the Court of Chancery. The words "solicitor" and "attorney" are commonly used indiscriminately, although they are not precisely the same; an attorney being a practitioner in the Courts of Common Law, a solicitor a practitioner in the Courts of Equity. Most attorneys take out a certificate to practise in the Courts of Chancery, and therefore become solicitors also; and, on the other hand, most, if not all, solicitors take out a certificate to practise in the Courts of Common Law, and therefore become attorneys also; and hence it is that the two words are commonly used as synonymous (see title ATTORNEY-AT-LAW). But under the Judicature Act, 1873, the common appellation or description of "Solicitor to the Supreme Court" is to be applied both to solicitors and to attorneys,—the description will probably be abbreviated into "S. S. C."

SOLVIT AD DIEM (he paid on the day).

A plea pleaded by a defendant in an action of debt, or bond, &c., to the effect that the money was paid at the day limited or appointed.

SON ASSAULT DEMESNE (his own assault). A plea which occurs in the actions of trespass and trespass on the case, by which the defendant alleges that it was the plaintiff's own original assault that occasioned the trespass for which he has brought the action, and that what the defendant did was merely in his own defence. Steph. Pl. 186, 187.

SOUGH. A drain or water course. The channels or watercourses used for the purpose of draining mines are so termed; and those mines which are near to and lie within the same level, and are benefited by any given sough, are technically said to lie within the title of that sough. See *Arkwright v. Gell*, 5 M. & W. 228, per Abinger, L.C.B.

SOUND IN DAMAGES. An action is technically said to sound in damages when it is brought, not for the specific recovery of lands, goods, or sums of money (as is the case in real and mixed actions, or in the personal actions of debt and detinue), but for recovery of damages only, as in actions of covenant, trespass, &c. Steph. Pl. 116.

SPEAKER OF THE COMMONS. The term "Speaker," as used in reference to either of the Houses of Parliament, signifies the functionary acting as chairman. In the Commons his duties are to put questions, to preserve order, and to see that the privileges of the House are not infringed; and in the event of the numbers being even on a division, he has the privilege of giving the casting vote.

SPEAKER OF THE LORDS. The Speaker of the Lords is the Lord Chancellor or the Lord Keeper of the Great Seal of England, or if he be absent the Lords may choose their own Speaker. "It is singular," says Mr. May, in his Treatise on the Privileges, &c., of Parliament, "that the president of this deliberative body is not necessarily a member. It has frequently happened that the Lord Keeper has officiated for years as Speaker without having been raised to the peerage; and on the 22nd of November, 1830, Mr. Brougham sat on the woolsack as Speaker, being at that time Lord Chancellor, although his patent of creation as a peer had not yet been made out." The duties of the Speaker of the Lords are principally confined to putting questions, and the Lord Chancellor has no more to do with preserving order than any other peer.

SPEAKERS OF THE HOUSES OF PARLIAMENT. Each House of Parliament has an officer termed a Speaker, who presides over and manages the formal parts of the business. The Speaker of the House of Lords is the Lord Chancellor, or keeper of the King's Great Seal, or any other person appointed by the king's commission; and if none be so appointed, the House of Lords (it is said) can elect. The Speaker of the House of Commons is chosen by the House, but must be approved by the king. May's Parl. Prac.

SPECIAL ACCEPTANCE OF A BILL OF EXCHANGE. Where the acceptor makes the bill payable at a particular place, "and not elsewhere," it is so termed. This is also sometimes termed a restrictive special acceptance as distinguished from one payable generally or at a particular place only, without the addition of the words "and not elsewhere."

See titles ACCEPTANCE; BILL OF EXCHANGE.

SPECIAL RAIL: See title **RAIL**.

SPECIAL CASE. When on a trial a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the judge or the Court above on what is termed a special case, that is, a written statement of all the facts of the case drawn up for the opinion of the Court in banc by the counsel and attorneys on either side, under correction of the judge at *nisi prius*. The party for whom the general verdict is so given is in such case not entitled to judgment till the Court in banc has decided on the special case; and according to the result of that decision the verdict is ultimately entered either for him or his adversary. It has also been provided by 3 & 4 Will. 4, c. 42, s. 25, that where the parties in an action on issue joined can agree on a statement of facts, they may, by order of a judge, draw up such statement in the form of a special case for the judgment of the Court without proceeding to trial. Steph. Pl. 102; 1 Arch. Prac. 452.

SPECIAL CONTRACT: See title **SIMPLE CONTRACT**.

SPECIAL DAMAGE. The damages which a plaintiff seeks to recover are either general or special. General damages are such as the law implies or presumes to have resulted from the wrong complained of. Special damages are such as really and in fact resulted, but are not implied by law, and are either superadded to general damages arising from an act injurious in itself, as, where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of some special or actual damage having resulted from the uttering them. Whenever the damages sustained by a party have not necessarily resulted from the act complained of, and consequently are not implied by law, the plaintiff must, in order to prevent surprise on the defendant which otherwise might ensue on the trial, state with particularity in his declaration the actual or special damage which he has sustained. 8 T. R. 133; 1 Ch. Pl. 395, 396, 6th ed.

SPECIAL DEMURRER. This has been abolished by the C. L. P. Act, 1852.

See title **DEMURRER**.

SPECIAL ISSUES. The issues produced upon special pleas, as being usually more specific and particular than those of *not guilty*, *never indebted*, &c., are sometimes described in the books as special issues by

SPECIAL ISSUES—continued.

way of distinction from the others, which are called general issues, the latter term being also applied not only to the issues themselves, but to the pleas which tendered and produced them. Steph. Pl. 109, 5th ed.; Co. Litt. 126 a; Heath's *Maxims*, 53; Com. Dig. "Pleader," (R. 2).

SPECIAL JURY is a jury composed of individuals above the rank of ordinary freeholders, and is usually summoned to try questions of greater importance than those usually submitted to common juries.

See title **JURY**.

SPECIAL OCCUPANT: See titles **PUTATIVE VIE** and **ESTATES**.

SPECIAL PAPER. A Court paper containing a list of special cases and demurrers set down therein for argument.

SPECIAL PLEADER: See title **SPECIAL PLEADING**.

SPECIAL PLEADING. When the allegations (or pleadings, as they are called) of the contending parties in an action are not of the general or ordinary form, but are of a more complex or special character, they are denominated special pleadings; and when a defendant pleads a plea of this description (i.e., a special plea) he is said to plead specially, in opposition to pleading the general issue. These terms have given rise to the popular denomination of that science which, though properly called pleading, is generally known by the name of special pleading. Hence, also, the denomination of "special pleader" as applied to those learned persons who are employed in drawing and framing special pleadings. These, it may be as well to observe, are mostly gentlemen who have studied for more than three years at one of the Inns of Court, and who may or may not intend, at some future period, to engage in the more complicated and important avocations of a barrister. Steph. Pl. 31, 186.

SPECIAL RULES. The grounds upon which certain rules are granted are subject to so little variation, and are so well understood, that in practice they are obtained from the proper officer of the Court upon application by the party or his attorney, and without any motion, actual or supposed. In other cases the motion need not be actually made in Court, but it is supposed to be made, and the proper officer draws up the rule on the production of a brief or motion paper signed by counsel; the rules granted without any motion in Court, or when the motion is only assumed to have been, and is not actually made, are called common rules, while the rules granted upon motion actually made to the

SPECIAL RULES—continued

Court in term, or upon a judge's order in vacation, are termed special rules. Bagl. Prac. 279; 2 Arch. Pr. 1708.

See also title **RULE NISI**.

SPECIAL TRAVERSE is that peculiar form of traverse or denial in pleading by which the party traversing seeks to explain or qualify his denial instead of putting it, as by a common traverse he would, in a direct and absolute form. And this he is enabled to do by first alleging new affirmative matter, which is called the inducement, and then by adding a distinct and formal denial of such portions of the adverse pleading as support the adversary's case. This negative part is, in the language of pleading, termed the *absque hoc* (without this), those being the words with which this portion of the plea commences, and the whole is finished by a conclusion to the country. The inducement or introduction of new affirmative matter, is usually employed for the purpose of avoiding some rule of law which would prohibit a plain and simple denial of the adversary's allegation, or sometimes for the purpose of raising a question of law at once upon the pleadings, and the negative part, or *absque hoc*, is generally necessary by reason of the inducement, which by itself would constitute an indirect (or argumentative) denial of the preceding statement, and would be at variance with the rules of pleading against argumentativeness. This form of traverse is now comparatively little employed. (Steph. Pl. 193-218, 5th ed.; 3 Chit. 908, 6th ed.; *Brudnell v. Roberts*, 2 Wils. 143; *Palmer v. Elvyns*, Lord Raym. 1550; Bac. Abr. Pleas, &c. (H. 1); Reg. Gen., Hil. Term, 4 Will. 4; and see an example of it in *Taitarum's Case*, 12 Edw. 4, Year Book, 19, translated in Tud. L. C. Conv. p. 605.

SPECIAL VERDICT: See title **VERDICT**.

SPECIALTY: See title **SIMPLE CONTRACT**.

SPECIE. As applied to a contract signifies specifically, strictly, or according to its specific terms. Thus, performing a contract *in specie* means performing it strictly, or according to its very terms. As applied to things it signifies individuality or identity. Thus, if I bequeath to A. a named or specific picture of *Raffaello's*, such bequest would only be satisfied by delivery to A. of the specific picture named, and not by delivery to him of any work of that master, nor by giving him the value of the picture bequeathed; and in this case A. would be said to be entitled to the delivery of the picture *in specie*, i.e., in kind. Whether a thing is due *in genere* or *in specie* depends in each case on the will of the transacting

SPECIE—continued.

parties. If a thing be designated only by its kind, as, e.g., any house whatever, or any of my houses, any cask of wine, or any cask of the vintage of 1834 in my cellar, it may be furnished *in genere*. But if the thing be designated individually, e.g., my house, No. 200, Waverley Place, or my five-year old bay saddle horse, it is not then generic, but must be furnished or returned *in individuo*. The practical distinction between the two is, that he who has a right or an obligation with respect to a thing specifically designated cannot require or furnish any other than the very thing itself; whereas, in the case of a thing which is designated generically, the party obliged has the choice of giving which of the species he will, as the other party has no right to any one in particular. Mac-keldy's Civ. Law, by Kaufmann, 152; Brown's Sav. 70.

SPECIFIC LEGACIES. Such legacies as are specified or particularised by a testator in his will, as the bequest of a particular diamond ring, or a particular horse, &c. It is used in contradistinction to a general legacy, which is expressive of such as are pecuniary or merely of quantity, as a bequest of £100, &c.; for in this instance no particular or specific £100 is bequeathed, but only a sum of money to that amount; whereas, in the former instance, the diamond ring and the horse are specifically bequeathed and cannot be supplied by another article of equal value. Toll. Ex. 300, 301.

See also title **LEGACIES**.

SPECIFIC PERFORMANCE. When a party has sustained damage or injury from the breach or non-performance of, or from delay in performing, any contract, &c., he may either have recourse to a Court of Common Law to obtain recompense in damages, or he may resort to a Court of Equity, which will compel the party to repair the injury by performing the terms of the contract *in specie*, as it is termed, i.e., specifically, or according to the specifications it contains; and this performing the terms of a contract *in specie* is called "specific performance."

The requisites which the Court of Chancery requires in order to its decreeing specific performance are the following:—

- (1.) That the act be both legal and moral;
- (2.) That it be for value;
- (3.) That it be within the power of the Court to enforce, and so there is no specific performance of,—
 - (a.) Contracts requiring personal skill (*Lumley v. Wagner*, 5 De G. & Sm. 485);

SPECIFIC PERFORMANCE—continued.

- (b) Contracts for transfer of goodwill apart from lease of premises (*Baxter v. Conolly*, 1 Jac. & W. 576);
- (c) Contracts to build or repair (*Moseley v. Virgin*, 3 Ves. 184); and
- (d) Contracts revocable in their nature (*Hervey v. Birch*, 9 Ves. 357);
- (4) That the contract be mutual (*Adderley v. Dixon*, 1 S. & S. 607); and
- (5) That damages at Law for breach of contract are not an adequate compensation.

Generally, therefore, the Court decrees specific performance of contracts regarding land, and not of contracts regarding personal estate. Yet in respect of personal estate, where the species of estate contracted for is (like land) limited in purchaseability, the Court decrees a specific performance of the contract,—e.g., regarding shares in a railway company (*Duncroft v. Albrecht*, 12 Sim. 199); debts proveable under a bankruptcy (*Adderley v. Dixon*, 1 S. & S. 607); articles of *vertu* (*Falcker v. Gray*, 4 Drew. 658); heir-looms (*Somerset v. Cookson*, 1 Wh. & Tud. L. C. Eq. 736); and such like. There appears to be no exception to the general rule that the Court will decree specific performance regarding land; indeed, the Court carries its principles so far in this respect that it will, in contravention of the Statute of Frauds, decree specific performance of an unwritten contract in special cases, being chiefly cases of part performance of the contract (*Surcombe v. Pinniger*, 3 De G. M. & G. 571), or of fraud. (*Fozcroft v. Lester*, 1 Wh. & Tud. L. C. 693).

Also, in the case of a contract regarding lands which is put into writing, but which the defendant alleges was afterwards varied by parol, although such parol variation would be worthless at Law, yet in Equity the plaintiff shall only have specific performance upon condition of accepting the defendant's terms (*Townshend v. Stangroom*, 6 Ves. 328). Sometimes, also, specific performance is decreed with a compensation for any misdescription or deficiency of the land or estate contracted for, but the misdescription or deficiency must (where the vendor asks specific performance) be of a compensable character (*McQueen v. Farquhar*, 11 Ves. 467); although that is not a requisite where the purchaser asks specific performance. *Hill v. Buckley*, 17 Ves. 401; and, *quære*, *Thomas v. Dering*, 1 Keen, 729.

SPECIFICATION. As used in patents and in building contracts is (what the

SPECIFICATION—continued.

name denotes) a particular or detailed statement of the various elements involved. See title PATENTS.

SPEEDY EXECUTION is an execution which, by the direction of the judge at *nisi prius*, issues forthwith, or on some early day fixed upon by the judge for that purpose after the trial of the action. By stat. 1 Will. 4, c. 7, s. 2, in all actions brought in the Courts of Law at Westminster "it shall be lawful for the judge before whom issue joined in any such action shall be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate," &c. This certificate is never granted where a material point has arisen at the trial, and upon which it is fair that the unsuccessful party should have an opportunity to take the opinion of the Court. And see now C. L. P. Act, 1852, s. 120; and r. 57, H. T. 1853; 1 Arch. Pract. 412. It seems that if the plaintiff will waive his costs he may also have speedy execution as a matter of course. 1 Arch. Pract. 525.

SPIRITUAL CORPORATIONS: See title CORPORATION.

SPIRITUAL COURTS: See title COURTS ECCLESIASTICAL.

SPIRITUALITIES OF A BISHOP. Those profits which a bishop receives in his ecclesiastical character, as the dues arising from his ordaining and instituting priests, presentation money, and such like, in contradistinction to those profits which he acquires in his temporal capacity as a baron and lord of parliament, and which are termed his temporalities, consisting of certain lands, revenues, and lay fees, &c. Staund. Pl. Cor. 132; Cowel.

SPIRITUOUS LIQUORS. These are inflammable liquids produced by distillation, and forming an article of commerce (*Att. Gen. v. Bailey*, 1 Ex. 281). Excise duties are payable by distillers; and by the stat. 9 & 10 Vict. c. 90, the use of stills by unlicensed persons was prohibited. Retailers of spirits have to pay licence duty. The most recent statutory regulations on the subject of the sale of all such liquors, including beer, are the Licensing Act, 1872 (35 & 36 Vict. c. 94), and the Amendment Act, 1874.

SPOILIATION. An injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right to them, but under a pretended title. It also seems to be used for a suit brought to recover the fruits of a church, or even the church itself, by one incumbent against another, when they both claim by one patron, and the right of patronage is not called in question; as if a patron first presents A. to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, the same patron presents B. to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the Spiritual Court for spoliation, or taking the profits of his benefice; and it shall there be tried whether the living were or were not vacant, upon which the validity of the second clerk's pretensions must depend. *Les Termes de la Ley*; F. N. B. 36.

SPOILIATOR. It is a maxim of law, bearing chiefly on evidence, but also upon the value generally of the thing destroyed, that everything most to his disadvantage is to be presumed against the destroyer (spoliator), *contra spoliatorem omnia presumuntur*. *Armory v. Delamirie*, 1 Sm. L. C. 315.

STAKEHOLDER. Is the person with whom money is deposited upon a bet or wager to abide the event. Such money may be recovered before the event, but not afterwards. *Manning v. Purcell*, 7 De G. M. & G. 55.

See title **WAGER**.

STALLAGE. A toll, or duty, payable for the liberty of erecting a stall in a fair or market. *Palm. Rep.* 77; *Com. Dig.* tit. "Market" (F. 2); *Brady Bor. App.* p. 12.

STAMP DUTIES. A branch of the royal revenue, consisting of a tax imposed on all parchment and paper, whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written. These duties are at present regulated by the Stamp Act, 1870 (33 & 34 Vict. c. 97), and Appendix thereto.

STANDING ORDERS. The rules adopted by the Houses of Parliament for the permanent guidance and order of their proceedings are called "Standing Orders," and are contradistinguished from the sessional orders (see that title), by the fact, that the former, unless rescinded by a special vote of the House, continue in force, not only from one session to another, but from one parliament to another; while the latter

STANDING ORDERS—continued.

are intended to last only during the session in which they are made. In the House of Lords every new standing order is added to "The Roll of Standing Orders," carefully preserved and published from time to time. In the Commons, there is no authorized collection of standing orders except in relation to private bills. May's Treatise on Parliament.

STANNARY COURTS. Courts in Devonshire and Cornwall for the administration of justice among the miners and tinners. These Courts are held before the Lord Warden and his deputies by virtue of a privilege granted to the workers of the tin mines there, to sue and be sued in their own Courts only, in order that they may not be drawn away from their business by having to attend law suits in distant Courts. *Bac. Abr.* tit. "Courts of the Stannaries."

STAR-CHAMBER. The Court called by this name is commonly regarded as being the *Aula Regis* sitting in the Star Chamber, a room at Westminster. The jurisdiction of the Court would, therefore, be all or some part of that residuary jurisdiction which remained after the severance of the Courts of Exchequer, Common Pleas, Queen's Bench, and Chancery.

By the stat. 3 Hen. 7, c. 1, the Court was remodelled, and its jurisdiction placed upon a lawful and permanent basis. That Act empowered the Chancellor, Treasurer, and Keeper of the Privy Seal, or any two of them, with one spiritual and one temporal peer, and the Chief Justices of the Courts of Queen's Bench and Common Pleas, or in their absence, two other justices, to call before them and to punish the following offenders and classes of offences:—

- (1) Combinations of the nobility and gentry, supported by liveries, &c.;
- (2) Partiality on the part of sheriffs in making up the panels of jurors, or in making untrue returns of members;
- (3) Bribery in jurors; and
- (4) Riots and unlawful assemblies.

By a later statute 21 Hen. 8, c. 20, the President of the King's Council was added to the list of judges; and by the stat. 31 Hen. 8, c. 8, which gave to the king's proclamations in ecclesiastical matters the force of law, all persons offending against such proclamations were to be tried before the Star-Chamber and punished with fine and imprisonment.

The jurisdiction of the Court is defined by Lord Bacon as extending to "force, frauds, crimes, various of stellionate, and the inchoations or middle acts towards

STAR-CHAMBER—continued.

crimes capital or heinous not actually committed or perpetrated."

The utility of the Star-Chamber, in the reigns of Henry VII. and subsequent monarchs consisted in two principal functions, viz.

- (1.) In its repression of the turbulence of the nobility and gentry in the provinces; and
- (2.) In its supplying a Court of jurisdiction for matters which, as being of novel origin, were unprovided for by the existing tribunals, e.g., in the case of offences against proclamations in ecclesiastical matters.

The effect of the Court was to enhance the royal authority, which it did by supplying the executive with a speedy and effective machinery. Cardinal Wolsey has the credit of having improved and extended the jurisdiction of the tribunal.

But the very nature of the jurisdiction of the Court of Star-Chamber rendered its process liable to great abuses; and Wolsey's connection with it was one of the principal causes of his unpopularity. The increase of those abuses was the ultimate cause of its abolition by the Long Parliament in 1640.

STATE OF FACTS. Formerly, when a Master in Chancery was directed by the Court of Chancery to make an inquiry or investigation into any matter arising out of a suit, and which could not conveniently be brought before the Court itself, each party in the suit carried in before the Master a statement shewing how the party bringing it in represented the matter in question to be; and this statement was technically termed a state of facts, and formed the ground upon which the evidence was received; the evidence being, in fact, brought by one party or the other to prove his own or disprove his opponent's state of facts (Gray's Ch. Prac. 109, 110). And so now, a state of facts means the statement made by any one of his version of the facts.

STATING PART OF A BILL IN CHANCERY: See title BILL IN EQUITY.

STATUTE. The statutes are the written laws of the kingdom, made by the king's majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled. They are either general or special, public or private. A general or public Act is a universal rule that regards the whole community; and of this the Courts of Law are bound to take notice judicially and *ex officio*, without the statute being specially pleaded or formally set forth by the party who claims advantage

STATUTE—continued.

of it. Special or private Acts are rather exceptions than rules; being those which only operate upon particular persons and private concerns: such as the Roman entitled *privilegia* (in the favourable sense of that word), or *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community; and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shewn and pleaded. Thus, for instance, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public Act; it being a rule prescribed to the whole body of spiritual persons in the nation. But an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years, is an exception to this rule; it concerns only the parties and the bishop's successors, and is therefore a private Act.

Various rules have been made regarding the construction or interpretation of statutes; the short substance of which is as follows:—

I. Where the words of the statute are unambiguous, then by the words alone it is proper to abide, unless, perhaps, in the case only of manifest absurdity (*Dr. Bonham's Case*, 8 Rep. 118 a):

II. Where the words of the statute are ambiguous, then the following subsidiary rules are to be applied:—

- (1.) Inquire the Common Law before the making of the statute;
- (2.) The mischief against which it did not provide;
- (3.) The remedy which Parliament thought to apply; and
- (4.) The true reason (i.e., true essence, or gist) of the remedy. *Heydon's Case*, 3 Rep. 7.

It used also to be a general rule, that penal statutes were to be construed restrictively, and beneficial statutes liberally; but as to the propriety of such a rule, there may well be considerable doubt. See Austin's Lectures on Jurisprudence.

STATUTES. An enumeration of the important early statutes of a more general character, which have produced a great effect in the history of English Law, both public and private, is here given,—

I. OTHER THAN ECCLESIASTICAL:—

1087: The 52nd Law of William I., making feudalism general.

1164: Constitutions of Clarendon, regulating the civil and ecclesiastical jurisdictions and the matters which were the proper subjects of such jurisdictions.

STATUTES—continued.

- 20 Hen. 3 (*Statute of Merton*).
- 52 Hen. 3 (*Statute of Marlbridge*).
- 3 Edw. 1 (*Statute of Westminster the First*).
- 6 Edw. 1 (*Statute of Gloucester*).
- 7 Edw. 1 (*Statute de Religiosis Viris*).
- 11 Edw. 1 (*Statute of Acton-Burnell*).
- 13 Edw. 1 (*Statute of Westminster the Second*).
- 13 Edw. 1 (*Statute of Merchants*).
- 13 Edw. 1 (*Statute of Circumspectè agatis*).
- 18 Edw. 1 (*Statute of Westminster the Third*).
- 25 Edw. 1 (*Statute of Confirmatio Chartarum*).
- 25 Edw. 1 (*Statute de Tallagio non Concedendo*).
- 28 Edw. 1 (*Statute of Articuli super Chartas*).
- 9 Edw. 2 (*Statute of Articuli Cleri*).
- 17 Edw. 2 (*Statute of Prærogativa Regis*).
- 25 Edw. 3, st. 4 (*Statute of Provisors*).
- 25 Edw. 3, st. 5, c. 4 (*Statute of Treasons*).
- 15 Rich. 2, c. 5 (*Statute of Mortmain*).
- 16 Rich. 2, c. 5 (*Statute of Præmunire*).
- 2 Hen. 4, c. 15 (*Statute de Hæretico Comburendo*).
- 4 Hen. 7, c. 24 (*Statute of Fines*).
- 11 Hen. 7, c. 1 (*Statute concerning Allegiance to a Sovereign de facto*).

II. ECCLESIASTICAL :—

- 10 Hen. 2 (Constitutions of Clarendon).
- 7 Edw. 1 (*Statutum de Religiosis Viris*).
- 9 Edw. 2, st. 1 (*Articuli Cleri*).
- 25 Edw. 3, st. 6 } (*Statutes of Provisors*).
- 27 Edw. 3, st. 1 }
- 15 Ric. 2, c. 5 (*Statute of Præmunire*).
- 24 & 25 Hen. 8 (Appeals to Rome taken away).
- 25 & 26 Hen. 8 (The King declared Supreme Head of the Church of England, and the Archbishop of Canterbury empowered to grant licences and dispensations in lieu of the Pope).
- 1 Eliz. c. 1 (*Act of Supremacy*).
- 1 Eliz. c. 2 (*Act of Uniformity*).
- 16 Car. 1 (Abolition of Court of High Commission).
- 6 Car. 2 (Establishment of Presbyterianism in England).
- 12 Car. 2 (Restoration of Episcopalianism in England).
- 13 Car. 2 (*Corporation Act*).
- 13 Car. 2 (*Act of Uniformity*).
- 16 Car. 2 (*Act against Conventicles*).
- 17 Car. 2, c. 2 (*Five Mile Act*).
- 25 Car. 2, c. 2 (*Test Act*).
- 1 W. & M. c. 8 (*Toleration Act*).
- 11 & 12 Will. 3, c. 4 (*Act of Settlement*).
- 13 Will. 3, c. 6 (*Oath of Abjuration*).
- 21 & 22 Vict. c. 48 (*Oath of Allegiance*).

STATUTES AT LARGE. Are an authentic collection of the various statutes which have been passed by the British Parliament from very early times up to the present day. The oldest of these now extant, and printed in our statute book, is the famous Magna Charta, as confirmed in Parliament 9 Hen. 3, though doubtless there were many Acts before that time, the records of which are now lost, and whose provisions are perhaps in the present day currently received for the maxims of the old Common Law, or customs of the realm. The statutes from Magna Charta down to the end of the reign of Edward II. (including also some which, because it is doubtful to which of the three reigns of Henry III., Edward I., or Edward II., to assign them, are termed *inæerti temporis*), compose what have been called the *vetera statuta*; on the other hand, those from the beginning of the reign of Edward III. are contradistinguished by the appellation of the *nova statuta*. Dwarries on Stat. 626.

STATUTE-MERCHANT. A writing in the nature of a bond, which was introduced in the reign of Edward I., for the purpose of allowing lands to be charged with the payment of debts contracted in trade, which was contrary to all feudal principles. It is called statute-merchant, because usually made between merchants, and according to the forms expressly provided by statute, which direct both before what persons, and in what manner, it ought to be made. It is somewhat in the nature of what is termed a *vitum cadium*, or living pledge, by which a man borrows a sum of money of another, and grants him an estate to hold till the rents and profits shall repay the sum so borrowed. A statute-merchant may, therefore, be said to be a security for a debt acknowledged to be due, and by which not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the rents and profits of them the debt may be satisfied; and during such time as the creditor so holds his lands he is called a tenant by statute-merchant, and such creditor's estate or interest in the lands during that period is termed an estate by statute-merchant.

STATUTE-STAPLE. A security for a debt acknowledged to be due before the mayor of the staple, that is, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns. It is called "statute-staple," because entered into before the mayor of such staple, and made according to certain forms prescribed by statute.

STATUTE-STAPLE—*continued.*

This security, which is in the nature of a bond given by the debtor to the creditor, is very similar to a statute-merchant, and was originally permitted only among traders for the benefit of commerce. By it, not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the profits and rents of them the debts may be satisfied; and during such time as the creditor so holds the lands he is called "tenant by statute-staple," and his estate or interest in the lands during that period is called an "estate by statute-staple."

STATUTE OF JEOPAILS: *See* titles **AMENDMENT; JEOPAIL.**

STEALING: *See* title **LARCENY.**

STEALING AN HEIRESS: *See* title **ABDUCTION.**

STET PROCESSUS. Is an entry on the roll in the nature of a judgment, of a direction that all further proceedings shall be stayed (*i.e.*, that the process may stand), and it is one of the ways by which a suit may be put an end to by an act of the party, as distinguished from a termination of it by judgment, which is the act of the Court.

STEWARD. This word signifies a man appointed in the place or stead of another, and generally denotes a principal officer within his jurisdiction. The greatest, however, of these was the Lord High Steward of England, whose functions were of a very important nature, having, next under the king, the supervision and regulating the administration of justice, and most other affairs of the realm, both of a civil and military nature. There is also an important officer, called a "steward of a manor," who has the general management of all forensic matters connected with the manor of which he is steward. He stands in much the same relation to the lord of the manor as an under-sheriff does to the sheriff. Cowel.

STEWARTRY. In the Scotch Law seems to be synonymous with the English word "county." Thus, "any shire or stewartry in Scotland," is used in the 12th section of 5 & 6 Vict. c. 35 (the Income and Property Tax Act); and by 1 Vict. c. 39, it is enacted that the word "county" occurring in any future or existing Act shall comprehend and apply "to any stewartry in Scotland, excepting where otherwise specially provided, or where there is anything in the subject or context repugnant to such meaning or application." *See* Bell's Sc. Law Dict. tit. "County."

STINT, COMMON WITHOUT. Common without stint is the right of commoning or feeding an unlimited number of cattle on the common, and that throughout the year, without limitation of time. The notion, however, of this species of common is said to be exploded, as a right of common without stint cannot exist in law. 2 Chit. Bl. 34, n. (32).

See further title **COMMON.**

STIRPES. Taking property by representation is called "succession *per stirpes*," in opposition to taking in one's own right, or as a principal, which is termed *per capita*. It is called succession *per stirpes*, because according to the roots; that is, all the branches inherit the same share that their root, whom they represent, would have done.

See also title **CAPITA, DISTRIBUTION PER.**

STOCK. This is the general name for the public funds, but is applicable generally to the like funds of corporate bodies. It is a chose in action, and cannot be sued for as money (*Nightingale v. Devienne*, 2 W. Bl. 684). It carries interest, which has been defined to be a right to receive a perpetual annuity subject to redemption (*Wildman v. Wildman*, 9 Ves. 177). The Bank of England is the depository of the public funds, and liable only as such (*Humberstone v. Chase*, 2 Y. & C. 209). The interest or dividends have by a recent Act (32 & 33 Vict. c. 104, the Dividends and Stock Act, 1869), been made payable upon warrants sent through the post.

See also next title.

STOCK EXCHANGE. This is a society or club, prescribing rules which bind its members, and its customs bind all persons, whether members or not, having dealings upon it. The persons transacting business professionally on the Exchange are either brokers or jobbers; the former being agents merely for their customers, the latter (especially since the stat. 23 Vict. c. 28, repealing Sir John Barnard's Act, 7 Geo. 2, c. 8) dealing for themselves while at the same time making purchases and sales for their customers, chiefly by means of what are called "time-bargains." *See* *Coles v. Bristowe*, L. R. 4 Ch. Ap. 3; *Grissell v. Bristowe*, L. R. 4 C. P. (Ex. Ch.) 36; and *Marted v. Paine*, L. R. 4 Ex. 81.

STOPPAGE IN TRANSITU. This is the right of the unpaid vendor of goods to stop them in certain cases before they have reached the actual or constructive possession of the vendee, and to resume the possession, so as to put himself in the same position as if he had not parted with it. The first case in which the principle

STOPPAGE IN TRANSITU—continued.

was acted on is *Wiseman v. Vandepuitt* (2 Vern. 203; Tudor's Merc. C. 631). The right arises properly only in cases in which the vendee or consignee has become bankrupt or insolvent; but a general inability to pay, evidenced by stoppage of payment, is sufficient to satisfy the rule (Sm. M. L., 8th ed., p. 544). Moreover, the right, or an analogous one, may exist by special contract. *Wilmshurst v. Bowker*, 2 Man. & G. 792.

The right determines when the goods have reached their destination, whether or not they are yet in the actual possession of the vendee. Usually, the carrier of the goods is a mere neutral agent between the vendor and the vendee; and in ordinary cases, therefore, the transit is regarded as continuing as long as the goods are in the carrier's possession. But if the carrier enters into any new relation with the vendee, becoming, e.g., custodian as well as carrier, that determines the transit, although the goods may not yet have reached their destination (*Whitehead v. Anderson*, 9 M. & W. 534). So, also, the exercise by the vendee of acts of ownership over the goods, will in general determine the transit; for example, if the vendee take samples of the goods with the intention of taking a constructive possession, and the carrier retaining possession of the goods has expressly or impliedly assented to keep the goods as agent for the vendee (*Whitehead v. Anderson*, *supra*). And if the goods are delivered on board the vendee's own ship, that determines the transit (*Schotmans v. Lancashire and Yorkshire Ry. Co.*, L. R. 2 Ch. App. 332), unless, indeed, the vendors in such a case procure (as they ought to procure) the master's bill of lading, making them deliverable to their order or assigns, for in this way they reserve to themselves the *jus disponendi* (*Turner v. Trustees of Liverpool Docks*, 6 Ex. 543) and may re-take possession, or transfer the property by indorsement and delivery of the bill of lading (*Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493). And where goods sold in London *free on board* (f. o. b.), to be paid for on delivery on board by bill or cash at a certain discount, were shipped on a vessel selected by the vendee, and the vendor elected to take a bill, and it appeared that by the custom of the port the expression "f. o. b." indicated that the vendee was considered as the shipper, although the vendor was to pay the expenses of shipment, it was held that the transit was determined by the delivery on board, and the receipt of the bill. *Covasee v. Thompson*, 5 Moo. P. C. C. 165.

Where goods are in a warehouse and not

STOPPAGE IN TRANSITU—continued.

on carriage, it is a general rule that the right of stoppage *in transitu* determines so soon as a delivery order is given by the vendor to the vendee, and the warehouseman assents thereto; but this is only so where no acts remain to be done, such as weighing, measuring, or separating, to ascertain the quantity, value, or identity of the goods (*Hanson v. Meyer*, 6 East, 614; Tud. M. O. 600). The mere giving of a delivery order does not operate as a constructive delivery of the goods (*M'Ewan v. Smith*, 2 H. L. O. 209); and the transfer of a delivery order has no such effect as the indorsement and delivery of a bill of lading (*Akerman v. Humphrey*, 4 Bing. 516). Moreover, the warehouseman's assent to hold the goods for the vendee may, in certain cases, estop him personally from denying their right to the possession of the goods, while it leaves the right of the vendors to stop *in transitu* unaffected. *Stonard v. Dunkin*, 2 Camp. 344.

Where there would be a right to stop if the *transitus* had begun, there is, *a fortiori*, a right to refuse to allow the transit even to begin. *Dizon v. Yates*, 5 B. & Ad. 313.

The right of stoppage is not determined by part payment or part delivery, unless in the latter case the vendee take possession of the part in name of the whole; although even then the vendor is entitled under certain circumstances to hold the remainder of the goods until the price for the whole is paid (*Wentworth v. Outhwaite*, 10 M. & W. 436). Neither is the right of stoppage determined by a resale of the goods by the vendee, in the absence of course of a previous delivery thereof to him. *Craven v. Ryder*, 6 Taunt. 433.

The right to stop *in transitu* is personal to the vendor or consignors; it does not belong to a surety for the price of the goods (*Siffken v. Wray*, 6 East, 371). The vendor may, however, at any time before the transit is ended, ratify and thereby make good the act of a stranger who stops the goods. *Bird v. Brown*, 4 Ex. 786.

Under the Interpleader Act, 1 & 2 Will. 4, c. 53, and the C. L. P. Act, 1860, s. 12, the master of a vessel, or warehouseman, having the goods in his possession, may obtain an order of interpleader upon the adverse claimants, and that whether or not the two claims have a common origin.

The following is a summary of the rules regarding stoppage *in transitu* :—

(1.) The right of stoppage *in transitu* is not a rescission of the contract, but at the most a re-vesting of the possession in the vendor. *Wentworth v. Outhwaite*, 10 M. & W. 451;

STOPPAGE IN TRANSITU—continued.

(2.) The right is personal to the consignee, and does not extend, *e.g.*, to a surety for the price of the goods. *Stiffen v. Wray*, 6 East, 371;

(3.) The right only endures during the transit, and the transit is taken to have ended so soon as the goods come into the actual or constructive possession of the vendee. *Edwards v. Dreuer*, 2 M. & W. 375;

(4.) The termination of the transit as to part is not the termination of it as to the rest (*Tanner v. Scovell*, 14 M. & W. 28); unless the contract was entire (*Hammond v. Anderson*, 1 N. R. 69);

(5.) The termination of the transit may be accelerated by the vendee (*Whitehead v. Anderson*, 9 M. & W. 518); but may not be prolonged by the carrier. *Bird v. Brown*, 4 Ex. 786;

(6.) The right to stop *in transitu* is defeated by the consignee's negotiating the bill of lading to a *bona fide* transferee for value (*Lickbarrow v. Mason*, 1 Sm. L. C. 699); *secus*, if to a *malá fide* transferee. *Cumming v. Brown*, 9 East, 514;

(7.) But the indorsee, even since 18 & 19 Vict. c. 111, takes subject to the equities attaching upon his indorser. *Gurney v. Behrend*, 2 E. & B. 622.

STRANGERS. These are third persons generally. Thus, the persons bound by a fine are parties, privies, and strangers. The parties are either the cognizors or cognizees; the privies are such as are in any way related to those who levy the fine, and claim under them by any right of blood, or other right of representation; the strangers are all other persons in the world, except only the parties and privies. In its general legal signification it is opposed to the word "privy." Those who are in no way parties to a covenant, nor bound by it, are also said to be strangers to the covenant.

STRIKING A JURY. Is the act of selecting or nominating a jury of twelve men out of the whole number returned as jurors on the panel. This, in common jury cases, is usually done by the associate of the Court at the trial putting all their names in a box, and then drawing out twelve promiscuously. The phrase, however, seems more commonly used with regard to a special jury, in which the mode of proceeding is somewhat varied. The proper officer of the Court appoints a time and place for "striking the special jury," at which the under-sheriff, or his agent, and the parties attend. The number from the jurors' list are then put into a box, and the forty-eight names corre-

STRIKING A JURY—continued.

sponding with the forty-eight numbers drawn by each party alternately, and this number is afterwards reduced, and constitutes the special jury. *Lush's Pt.* 471, 477; *stat. 6 Geo. 4, c. 50, ss. 30, 32, 34, 37*; *Juries Act, 1870 (33 & 34 Vict. c. 77)*.

STRONG HAND. The words "with strong hand" imply a degree of criminal force, and much more than is meant by the words "with force and arms" (*ri et armis*). The statutes relating to forcible entries use these words, "with a strong hand," as describing that degree of force which makes an entry or detainer of lands criminal, and entitles the prosecutor, under circumstances, to restitution and damages; whereas the words "*ri et armis*," with force and arms, are mere formal words in the action of trespass, and if issue were taken upon them, the plaintiff would not be bound to prove any force. *Re v. Wilson*, 8 T. R. 362, 363; *per Lawrence, J., Love v. King*, 1 Saund. 81; *Harvey v. Brydges*, 14 M. & W. 440, *per Parke, B.*

STUFF GOWN. Is the professional robe worn by barristers of the outer bar, viz., those who have not been admitted to the rank of Queen's counsel.

See title SILK GOWN.

SUBINFEUDATION. The system which the feudal tenants introduced of granting smaller estates out of those which they held of their lord, to be held of themselves as inferior lords; and as the system was proceeding downwards *ad infinitum*, and deprived the lords of their feudal profits of wardships, marriages, and escheats, which fell into the hands of these mesne, or middle, lords, who were the immediate superiors of him who occupied the land, a provision was made in the thirty-second chapter of Magna Charta, 9 Hen. 3, prohibiting any man either to give or sell his land without reserving sufficient to answer the demand of his lord. Ultimately, by the *stat. Quia Emptores*, 18 Edw. 1 (*Statute of Westminster the Third*), c. 1, subinfeudation was entirely suppressed, and instead of it alienation in the modern sense was introduced, so that thenceforth the alienor held of the same chief lord and by the same services that his alienor before him held.

See title ALIENATION.

SUBMISSION: *See next title.*

SUBMISSION BOND: *See next title.*

SUBMISSION TO ARBITRATION. The submitting matters in difference between parties to the award or decision of an arbit-

SUBMISSION TO ARBITRATION—cont.

trator, and also the bond by which the parties agree so to submit their matters to arbitration, and by which they bind themselves to abide by the award of the arbitrator, are commonly called the submission or submission bond.

SUBORNATION OF PERJURY.

The offence of procuring another to take such a false oath as would constitute perjury in the principal. To render the offence of subornation of perjury complete, either at Common Law or on the statute, the false oath must be actually taken, and no abortive attempt to solicit the party to take it will bring the offender within its penalties. (3 Mod. 122). The punishment is the same as for perjury, viz., fine or penal servitude for not more than seven nor less than five years, 3 Geo. 4, c. 114; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

SUBPENA. A writ by which persons are commanded to appear at a certain place, at a certain time, under a penalty of £100. This writ is used both in the Courts of Chancery and in the Courts of Common Law, and is applied to various purposes. The subpoena most frequently in use in Chancery proceedings was that by which parties were commanded to appear in Court, and answer the plaintiff's bill, and which was thence called a subpoena to appear and answer. This subpoena was, however, abolished by the Jurisdiction Act, 1852. There are, however, other subpoenas still in use in Chancery proceedings, and which are of the same nature as the above, though applied to effect different objects. The subpoenas of most frequent occurrence in Common Law proceedings are, (1.) Those used for the purpose of compelling witnesses to attend in Court to give their testimony on a trial, and which are thence called *subpoenas ad testificandum*; (2.) Those used for the purpose not only of compelling witnesses to attend in Court, but also requiring them to bring with them books or documents which may be in their possession, and which may tend to elucidate the subject matter of the trial, and which are thence called *subpoenas duces tecum*.

SUBROGATION. In French Law denotes the putting a third person who has paid a debt in the place of the creditor to whom he has paid it, so as that he may exercise against the debtor all the rights which the creditor if unpaid might have done. It is of two kinds,—either (1.) Conventional, or (2.) Legal, the former being where the subrogation is *express* by the acts of the creditor and the third person, the latter being (as in the case of sureties)

SUBROGATION—continued.

where the subrogation is *implied* by the law.

SUBSCRIBING WITNESS. He who witnesses or attests the signature of a party to an instrument, and in testimony thereof subscribes his own name to the document.

SUBSEQUENT CONDITIONS: See title CONDITION.

SUBSIDY. An extraordinary grant in the nature of a tax, aid, or tribute granted by Parliament to the King to meet the exigencies of the state.

See title TAXATION.

SUBTRACTION. Is the offence of withholding (or withdrawing) from another man what by law he is entitled to. There are various descriptions of this offence, of which the principal are as follows:—

(1.) Subtraction of suit and service, which is a species of injury affecting a man's real property, and consists of a withdrawal of (or a neglect to perform or pay) the fealty, suit of court, rent, or customary services, all of which in feudal times, and some of which at the present day, are reserved by the owner of the land to himself when he lets or leases it to another. For this neglect of duty on the part of the tenant the law gives the landlord the peculiar remedy of distress; but the other remedies formerly in use for rent in arrear, and for subtraction of suit and service, were abolished by the stat. 3 & 4 Will. 4, c. 27, which put an end to almost all kinds of real actions; the only actions which now lie for rent being of the personal class. But for the neglect to perform any customary service, such as the neglect or refusal to grind corn at the landlord's mill, an action on the case will lie to compensate the party injured in damages. 2 B. & C. 827.

(2.) The subtraction of tithes is the withholding from the parson or vicar, whether the former be a clergyman or a lay impropriator, the tithes to which he is entitled, and this is an offence cognizable in the Ecclesiastical Courts; for though those Courts have no jurisdiction to try the right of tithes (unless between spiritual persons), yet where only the fact, whether or not the tithes allowed to be due are really subtracted or withdrawn, is in dispute, this is a personal transient injury, for which the remedy (viz., the recovery of the tithes or their equivalent) may properly be had in the Ecclesiastical Court. But any dispute as to tithes in their original form is now rare, that species of property having been in the great majority of parishes already

SUBTRACTION—continued.

commuted into a corn rent-charge, under the provisions of the Tithe Commutation Act (6 & 7 Will. 4, c. 71). 2 Roll. Abr. 309.

(3.) Subtraction of conjugal rights is the withdrawing or withholding by a husband or wife of those rights and privileges which the law allows to either party. This is an offence peculiarly within the cognizance formerly of the Ecclesiastical Courts, and now of the Court for Matrimonial Causes, and the party injured seeks redress by bringing a suit to recover those rights of which he or she has been deprived, called a suit for the restitution of conjugal rights. Thus, where the husband leaves his wife, and lives separate from her, without any sufficient reason, the Court in question will compel him to return to cohabitation.

(4.) Subtraction of legacies is the withholding or detaining of legacies by an executor; and as such act deprives the legatees of the benefit which the law gives to them, and which the testator intended them to have, it is an offence of which the Courts which have a testamentary jurisdiction take notice. With them, however, the Courts of Equity hold a concurrent jurisdiction.

(5.) Subtraction of church-rates is the last and most familiar class of "subtraction," and consists in the refusal to pay the amount of rate at which any individual parishioner has been assessed for the necessary repairs of the parish church; and this, like the other species of this offence, is cognizable by the Courts Ecclesiastical. Roger's Ecc. Law, 983-999; 1 Curt. 372; 4 Ad. & E. 423; 1 Curt. 345; 12 Ad. & E. 233, 265; 1 Atk. 516; 2 Mad. 251.

SUCCESSION DUTY. This is a duty varying from one to ten per cent., payable under the stat. 16 & 17 Vict. c. 51, in respect chiefly of real estate and leaseholds, but generally in respect of all property (not already chargeable with legacy duty) devolving upon any one in consequence of any death. The duty is to be paid at the time the successor comes into possession or into the receipt of the rents or income of the property (*Re Hillas*, 2 Ir. Jur. 36), and, therefore, in the case of reversionary property, not until the same falls into possession by natural causes only. (Contrast LEGACY DUTY.) In case the reversionary property should devolve under several wills or intestacies before it falls into possession, a single duty only is payable, but that duty is to be at the highest rate of the several successions (16 & 17 Vict. c. 51, s. 14). (Contrast LEGACY DUTY.) If any succession is not wholly obtained by the successor in the first instance, the

SUCCESSION DUTY—continued.

duty may be paid on the value of the part from time to time obtained, such value to be estimated as the property exists at the time it is obtained, and not at the time of the death (*Att.-Gen. v. Cavendish*, Wigh. 82). (Compare LEGACY DUTY.) If the succession is a gross sum (not being real or leasehold estate) vesting at once in the legatee, then, whether the same be or not given over on a contingency, duty on the whole amount is payable all at once, with a right to be recouped any over-payment in case the gift over takes effect, in which case the successor over becomes chargeable with the same, and at the higher rate, if his rate should be higher than that of the first legatee, 16 & 17 Vict. c. 51, s. 36 (compare LEGACY DUTY); but if the succession is not a gross sum, but an annuity for life or for years, then, whether the same be or not charged upon some other succession, and whether the same be or not given over on a contingency, duty is payable on the value only of the annuitant's interest calculated according to the tables of the Act 16 & 17 Vict. c. 51, and is to be paid by four successive annual instalments, such instalments being payable with the four first successive payments of the annuity itself, with a right to be recouped any over-payment in case the gift over takes effect; but in the case of a direction to purchase an annuity, or of a perpetual annuity, the duty is to be paid all at once on the value of the annuitant's interest calculated as aforesaid (16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of a gift of personal property producing income to several persons in succession,—(a.) If all the successors are chargeable with the same rate of duty, the whole duty is payable at once for the capital of the fund; and (b.) If the successors are chargeable with different rates of duty, the duty is to be calculated and paid upon each successive partial interest in the same manner as if the same were an annuity, and last of all upon the ultimate interest (being the absolute interest), in the same manner as if the same were an immediate gift of the capital (16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of successors in joint tenancy, each is chargeable at his own rate of duty, in the first instance, upon his then share, and afterwards (if it should happen) upon his accrued share. (Compare LEGACY DUTY.) In the case of money directed to be laid out in the purchase of lands, see LEGACY DUTY under that head. In the case of successors to real property, each successor, whether for life or in fee, is chargeable at his own rate of duty upon the value of his life interest, as if the same were an annuity for

SUCCESSION DUTY—continued.

his life, and such duty is payable by eight half-yearly instalments,—the first thereof at the end of one year; but a successor for life only, if he should die before all these instalments are paid pays no more, while on the other hand a successor in fee, if he should die in like manner, remains chargeable with the unpaid instalments. But corporations stand upon a different footing in this respect (16 & 17 Vict. c. 51, ss. 16-17). No succession duty is payable upon a fund which is specially provided for the payment of duty—"no duty upon duty"—(16 & 17 Vict. c. 51, s. 32). (Compare LEGACY DUTY.) In the case of legacies which are subject to powers of appointment, it is provided by 36 Geo. 3, c. 52, s. 18, as follows: (1.) Where the power is limited both the appointees and the persons taking interests, either prior or subject to such power, are chargeable; and (a.) If the rate of each legatee is the same, the duty is payable at once upon the capital of the fund; but (b.) If the rates of the several parties are different the duty payable by each is calculated as for an annuity. (2.) Where the power is general—(a.) If the appointor is entitled in default of appointment, the appointor pays the duty, as upon an absolute gift to him; and (b.) If the appointor is not entitled in default, the rule is the same, whether he takes or not any interest prior to the power (16 & 17 Vict. c. 51, s. 4).

SUCCESSION TO CROWN, LAW OF.

The law of succession in Anglo-Saxon times was a mixture of the hereditary with the elective principles, the Crown descending within the royal family, but not invariably to the individual pointed out by the strict rules of descent; for in very many instances the Wittenagemote seems to have approved as a successor an able uncle in preference to the infant son of his brother, e.g., Alfred excluded the son of his brother Ethelred, and Athelstan (although illegitimate) excluded the sons of his brother Edward the elder; and again, the sons of Edmund I. were postponed to their uncle Edred, and in their turn they excluded the sons of Edred. The frequency of these instances proves that the principle of election was as strong as that of hereditary descent, if, in fact, the former principle was not the stronger of the two.

This mode of succession survived into the Anglo-Norman times, although the elective principle was much impaired. Thus, upon the death of William I., his son William succeeded in exclusion of Robert; and again, upon the death of William II., his brother Henry I. succeeded, in exclusion also of Robert. Subsequently,

SUCCESSION TO CROWN, LAW OF—con.

however, the rules of descent became fixed and strictly hereditary. It is true that John, who was the fifth son of Henry II., excluded his elder brother Geoffrey's son Arthur, but John appears to have done so with difficulty, and by means of artifice, for he claimed under a devise of the Crown from Richard I., who was elder than Geoffrey, it being probably at that epoch a moot point whether the Crown was or not devisable. However, upon the death of John the Crown descended upon Henry III., although he was a minor of nine years or so, and the subsidiary principle of a regency (under the Earl of Pembroke) was resorted to; so that the law of hereditary succession to the Crown appears by a somewhat natural coincidence to have become established at the same time and in the same reign that the principles of primogeniture and representation were established in the matter of the succession to real property.

The Crown of England has since descended according to the strictest rules of primogeniture and representation. However, the doctrine of the king's capacity to devise the Crown was revived in the reign of Henry VIII., that monarch having attempted to devise the Crown, and having also made a purported devise thereof in the 28th, 32nd, and 35th years of his reign, under enabling statutes passed in those years, in such manner as that the same should descend upon his decease otherwise than the law of inheritance pointed out, that is to say, to the issue of Anne Boleyn (i.e., Elizabeth) in exclusion of the issue of Queen Catharine (i.e., Mary), and subsequently to his son by Jane Seymour (i.e., Edward VI.), with remainder to the issue of the younger daughter of Henry VII. (i.e., Mary of Suffolk, his sister) in exclusion of the issue of the elder daughter of Henry VII. (i.e., Margaret of Scotland, his sister). It is noteworthy, however, that all those attempts to alter the hereditary line of descent proved ineffectual, and that upon the death of Henry VIII. the Crown descended successively to Edward VI., Mary, and Elizabeth, and afterwards to James I., who was the great grandson of Margaret, according to the strict principles of primogeniture and representation, and notwithstanding that there were at the time of each descent persons in existence who might have claimed under the devices before mentioned.

However, although the principle of hereditary succession to the Crown is now, and has long been, well established, still that principle is, or appears at any rate to be, subject to the constitutional maxim established at the Revolution of 1688, namely,

SUCCESSION TO CROWN, LAW OF—*cop.*

that the two Houses of Parliament may, with the consent of the people, but for reasons of overwhelming sufficiency, set aside or pass over the strict heir, and resort to the old principle of election within the royal family, and may even settle the descent of the Crown by Act of Parliament, as was done, for example, in the Bill of Rights, 1689. and again in the Act of Settlement, 1701, the present Brunswick dynasty holding, and claiming to hold, under the last-mentioned Act.

See titles **BILL OF RIGHTS**, and **SETTLEMENT, ACT OF**.

SUE (from Latin *sequor*, to follow). To prosecute by law; to commence legal proceedings against a party. It is applied almost exclusively to prosecuting a civil action against one. He who has had process issued against him is said to have been sued.

SUFFERANCE. A tenant at sufferance is he who holds lands or tenements by the implied permission of the owner. Thus, if a man takes a lease for a year, and after the year is expired continues to hold the premises without any fresh leave of the owner, such man is called a tenant at sufferance, and the estate which he so continues to hold is then called an estate at sufferance. And generally, a tenant at sufferance is one who comes in by right and holds over by wrong, i.e., without right. See *Rouse's Case*, Tud. Conv. 1.

SUFFERING A RECOVERY. A recovery, as has been explained under that title, was a mode of conveyance formerly in use, which was effected by the party wishing to convey the land suffering a fictitious action to be brought against him by the party to whom the land was to be conveyed (who was called the demandant), and allowing the demandant to recover a judgment against him for the land in question. The vendor, or conveying party, in thus assisting or permitting the demandant so to recover a judgment against him was thence technically said to "suffer a recovery."

See title **RECOVERY**.

SUFFRAGAN (from *suffragari*, to help, or assist). Bishops who in former times were appointed to supply the place of others during their absence on embassies or other business were so termed. They were consecrated as other bishops were, and were anciently called "*chorepiscopi*," or bishops of the county," in contradistinction to the regular bishops of the city or see. The practice of creating suffragan bishops after having long been discontinued was recently re-

SUFFRAGAN—*continued.*

vived; and such bishops are now assistants of the bishops generally and at all times.

SUGGESTIONS, ENTRY OF, ON THE ROLL. In actions at law, whenever, by the provision of an Act of Parliament or otherwise, a person not a party to the record is to be affected by a judgment, or where the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is to enter a suggestion on the roll, so that the party to be affected by it may demur if he thinks the facts suggested are insufficient in point of law; or to plead if he means to deny them. As where there are two or more plaintiffs or defendants, and one or more of them die, the action will not be abated, but such death being suggested on the record, the action may be continued by or against the survivors, with or without the representatives of the deceased party. A suggestion is also entered upon the record where a person not a party to the action is to be affected by the judgment, under the provisions of an Act of Parliament (as the members of a company by a judgment against the secretary), or where the judgment is to be such as would not be ordinarily warranted by the proceedings on the record, or where the sheriff to whom the *venire* is to be awarded is interested in the suit, or where, by the order of the Court, the venue in a local action is removed to another county, and in many similar cases, where the circumstances involve a deviation from the ordinary course of proceeding. C. L. P. Act, 1852, and Jurisdiction in Chancery Amendment Act, 1852; 2 Arch. Pract. 1566; 2 Dan. Ch. Prac. 1393.

SUICIDE: See title **FELO DE SE**.

SUIT. This word has various significations. As applied to proceedings at Law, it originally signified a number of persons or witnesses which a plaintiff produced to establish the truth of the allegations made in his declaration; and this practice of producing a suit gave rise to the very ancient formula almost invariably used at the conclusion of a declaration, *et inde producit sectam* (and therefore he brings his suit); and thus, though the actual production has for many centuries fallen into disuse, still the formula until recently remained. The other meaning to which the word "suit" is applied will be found under the following titles. Steph. Pl. 461.

SUIT AT LAW: See title **ACTION**.

SUIT IN EQUITY: See title BILL IN CHANCERY.

SUIT OF COURT. This phrase denoted the duty of attending the Lord's Court, and, in common with fealty, was and is one of the incidents of a feudal holding.

SUIT OF THE KING'S PEACE (*secta pacis regis*). The pursuing a man for breach of the king's peace by treasons, insurrections, or trespasses. Cowel.

SUITORS' FUND IN CHANCERY was a fund standing in the name of the Accountant-General of the Court of Chancery, and arising out of the interest which accrued from the large sums of money paid into the name of the Accountant-General by the suitors of that Court. There appear to have been two principal accounts kept at the Bank of England by the Accountant-General of Chancery with regard to the Suitors' Fund. The one was intitled "Account of the moneys placed out for the benefit and better security of the suitors of the High Court of Chancery," and the other, "Account of securities purchased with surplus interest arising from securities carried to an account of moneys placed out for the benefit and better security of the suitors of the High Court of Chancery." In cases of poverty, the Court would sometimes allow the costs of a defendant's contempt to be paid out of the "Suitors' Fund" (1 Daniell, Ch. Pr. 425). Now, however, under the statutes 32 & 33 Vict. c. 91 (Courts of Justice Salaries and Funds Act, 1869), and 35 & 36 Vict. c. 44 (Court of Chancery Funds Act, 1872), and the Chancery Funds Rules, 1872, the Suitors' Fund has been reduced to a varying amount, and vested in an officer called the Paymaster-General, who has been substituted for the Accountant-General, and the surplus moneys have been transferred to the Treasury in trust for the public and on their indemnity.

SUMMARY CONVICTIONS. Summary proceedings directed by several Acts of Parliament for the conviction of offenders, and the inflicting of certain penalties created by those Acts of Parliament. In these proceedings there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed to be his judge, and who is usually the magistrate, or bench of magistrates. See Oke on Summary Convictions; Greenwood and Martin, 1874.

SUMMONS. The process used for bringing a party before a justice of the peace on summary conviction is termed a summons. It is also sometimes called a warrant, but the latter term commonly

SUMMONS—continued.

denotes that instrument which authorizes the apprehension of the accused, which a summons does not generally do.

SUMMONS AND ORDER. In the progress of an action at law it frequently becomes necessary to obtain the order of the Court upon some matter of minor importance; and as such matters are of very frequent occurrence, it would be inconvenient in many respects to permit the party seeking such an order to make an application for the same in open Court; in consequence of which, one of the judges usually sits at his own chambers for the purpose of hearing and disposing of such minor matters. The party who wishes to obtain a judge's order must usually summon the attorney or agent of the opposite party before the judge, which he does by obtaining a judge's summons, and serving it on such opposite party, which summons requires him to attend before the judge at a specified time, to shew cause why the party applying for the order should not have it granted him. The order of the judge, when granted, usually orders or grants liberty to the applicant to have what he seeks. 2 Arch. Pract. 1598.

SUMMONS, WRIT OF. The writ or process used for the commencement of all personal actions in the Courts of Law. It is a judicial writ (i.e., a writ issuing out of the Court in which the defendant is to be sued, and witnessed in the name of its chief judge), and is directed to the defendant, whom it commands to appear in Court at the suit of the plaintiff. By the O. L. P. Acts, 1852 and 1854, six general forms of this writ were provided, viz.,

- I. Where defendant is within the jurisdiction, and the writ bears no special indorsement;
 - II. Where defendant is within the jurisdiction, and the writ bears a special indorsement;
 - III. Where defendant, being a British subject, is out of the jurisdiction;
 - IV. Where defendant, not being a British subject, is out of the jurisdiction;
 - V. Where the plaintiff seeks a mandamus (C. L. P. Act, 1854, s. 68); and
 - VI. Where the plaintiff seeks an injunction. C. L. P. Act, 1854, ss. 79-82.
- And under the Summary Procedure on Bills of Exchange Act, 1855, where that process is set in motion, it is by means of a writ of summons specially provided for the purpose. See 18 & 19 Vict. c. 67.
- Under the Judicature Act, 1873, a writ of summons is prescribed for the commencement of all proceedings in the Court of Chancery.

SUMPTUARY LAWS. Laws made for restraining excess of expenditure in clothes and apparel, &c. Cowell.

SUNDAY. Contracts made on Sundays by persons in their usual trades are invalid under the stat. 29 Car. 2. c. 7 (*blancouse v. W. 11. 10. 3 B. & C. 232*). The statute applies to "tradesmen, artificers, workmen, labourers and other persons whatsoever"; but it does not extend to people not falling within these categories, *e.g.* to a stage-coach owner (*Stratford v. Birch*, 7 B. & C. 166); and works of necessity are expressly excepted.

SUPERIOR COURTS. The Courts of the highest and most extensive jurisdiction, viz., the Court of Chancery and the three Courts of Common Law, *i.e.*, the Queen's Bench, the Common Pleas, and the Exchequer, which sit in Westminster Hall, are commonly so termed. 4 Steph. Pl. 368, 369, 5th ed. See also *Pencock v. Bell*, 1 Sandw. 73; 12 Ad. & E. 256; 4 Ad. & E. 433, 446.

See title COURTS OF JUSTICE.

SUPERSEDE. To stay, stop, interfere with, or annul. Thus, the proceedings of outlawry may be superseded at any time before the return of the exigent by the entry of the defendant's appearance with the clerk of the outlawries. So the Lord Chancellor or Court of Appeal in Chancery would supersede or annul a fiat in bankruptcy, if it had been improperly issued, as where the bankrupt was discovered not to be a trader within the bankruptcy laws (10 Bing. 544; 1 Mont. & Ayr. Bankruptcy, 514-557; 5 & 6 Vict. c. 122, s. 4).

See also next title.

SUPERSEDEAS. A writ which lies in various cases to supersede or to stay the doing of that which ought not to be done (on account of the particular circumstances of the case), but which ordinarily may be done. Thus, for example, a man may commonly obtain surety of peace against another of whom he swears he is in bodily fear, and the justice of whom the same is required cannot commonly deny the party such surety; but if the party has been before bound to the peace, then a writ of superseas lies to stay the justice from doing that which otherwise he ought not to deny. F. N. B. 236.

See also title SUPERSEDE.

SUPERSTITIOUS USES. What these are depends partly on the Common Law, which renders it incumbent on the Crown to prevent the propagation of a false religion, and partly upon particular statutes, being principally the following:—

(1.) 23 Hen. 8, c. 10, assurances of lands

SUPERSTITIOUS USES—continued.

to uses to have *obits perpetual*, or continual service of a priest for ever;

(2.) 1 Edw. 6, c. 14, lands given to the finding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and,

(3.) 1 Geo. 1, c. 50, a statute appointing a commission to inquire into and confiscate to the king lands held on superstitious uses.

Inasmuch as the doctrines of Protestant Dissenters, of Roman Catholics, and of Jews were all deemed contrary to the national worship more or less, all trusts in aid of such teachings were deemed superstitious; but Dissenters were relieved of this interpretation by the Toleration Act, 1689. Roman Catholics by the stat. 2 & 3 Will. 4, c. 115, and Jews by the stat. 9 & 10 Vict. c. 59.

See also title CHARITABLE USES.

SUPPLEMENTAL BILL. In a suit in Chancery it frequently happens that new matter has arisen or is discovered since the filing of the original bill in the suit, or that some of the parties have acquired a new interest, or that fresh parties have acquired an interest in the matter in question; all which matters must be brought to the knowledge of the Court upon the proceedings. Now it occasionally happens that some of these objects may be accomplished by amending the bill; but after the parties are at issue, and witnesses have been examined in the suit, the bill cannot usually be amended, and therefore the defect is in such case supplied by means of what is termed a supplemental bill (Gray's Ch. Pr. 86). However, under the modern practice, the Court will sometimes, on an *ex parte* application by motion or petition, make an order to revive and carry on the proceedings in the original suit without the necessity of filing any supplemental bill.

SUPPLETORY OATH. In the modern practice of the Civil Law they do not allow a less number than two witnesses to be *plena probatio* (full proof); they call the testimony of one *semi-plena probatio* only, on which no sentence can be founded. In order to supply the other half of proof, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and the oath administered to him for that purpose is called the suppletory oath, because it supplies the necessary *quantum* of proof on which to found the sentence.

SUPPLICAVIT. A mandatory writ issuing out of the Court of King's Bench or Chancery to compel a justice to give security of peace to a party who is in bodily danger.

SUPPLIES. The "supplies," in parliamentary proceedings signify the sums of money which are annually voted by the House of Commons for the maintenance of the Crown and the various public services.

See titles **COMMITTEE OF SUPPLY**, and **COMMITTEE OF WAYS AND MEANS**.

SURCHARGE. This word signifies overcharge, or over and above the regular amount. Thus, surcharge of the forest or of common signifies the putting in the forest or on the common more beasts than one has a right to put; and if, after admeasurement of common, upon a writ of admeasurement of pasture, the same defendant surcharges the common again, the plaintiff may have a writ of second surcharge (*de secundâ superatione pasturæ*), by which the sheriff is directed to inquire by a jury whether the defendant has in fact again surcharged the common contrary to the tenor of the last admeasurement, and if he has, he shall then forfeit to the king the supernumerary cattle put in, and shall also pay damages to the plaintiff.

SURCHARGE AND FALSIFY. This phrase, as used in the Courts of Chancery, denotes the liberty which these Courts will occasionally grant to a plaintiff who disputes an account, which the defendant alleges is settled, to scrutinize particular items therein without opening the entire account. The shewing an item for which credit ought to have (but has not) been given is to surcharge the account; the proving an item to have been inserted wrongly is to falsify the account.

SUR CUI IN VITA. A writ that lay for the heir of a woman whose husband had aliened her land in fee, and she omitted to bring the writ of *cui in vita* for the recovery thereof; in which case her heir might have this writ against the tenant after her decease. Cowel.

SURETY OF THE PEACE. Surety of the peace is a species of preventive justice, and consists in obliging those persons whom there is a probable ground to suspect of future misbehaviour, to stipulate with, and to give full assurance to, the public that such offence as is apprehended shall not take place, by finding pledges or securities for keeping the peace, or for their good behaviour. This security consists in being bound with one or more securities in a recognizance or obligation to the king entered on record, and taken in some Court, or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required (for instance £100), with condition to be void and of none effect if the party shall appear in Court on such a day, and in the

SURETY OF THE PEACE—continued.

meantime shall keep the peace, either generally towards the king and all his liege people, or particularly also with regard to the person who seeks such security. Or if the security be for the good behaviour of the party, then on condition that he shall demean and behave himself well (or be of good behaviour), either generally or specially, for the time therein limited.

SURETYSHIP. This word denotes the relation in which one person who is not primarily indebted stands towards two other persons, viz., the primary creditor whom he further assures in his debt, and the primary debtor whom he assists in obtaining credit. The relation is contractual in these respects, viz., the surety agrees with the creditor to pay him, failing the debtor; and the debtor agrees to repay the surety the amount which he may have paid on his account to the creditor.

The utmost good faith is required from all parties to this contract, any concealment or misrepresentation of material facts on the part of the creditor releasing the surety (*Pidecock v. Bishop*, 3 B. & C. 605; and *quere Hamilton v. Watson*, 12 Cl. & F. 109). Whence the surety will be discharged if the creditor varies the contract with his debtor without the surety's privity, or if without the surety's consent he give time to the debtor, or release the debtor, but not if he merely covenant not to sue the debtor.

It seems that the surety cannot compel the creditor (as in Roman Law, *beneficium excussionis vel ordinis*) to obtain payment of his debt from the debtor; but he can compel the debtor to pay the debt when due (*Padwick v. Stanley*, 9 Hare, 627). And in case the surety has been called upon to pay, and has paid, the debt, then he is entitled to be re-imbursed the amount by the debtor, a right which is commonly called his right to *recoupment*. He has also under such circumstances a right to have all securities held by the creditor delivered up to him, whether or not the same securities, or any of them, are satisfied by his own payment of the debt (*Hodgson v. Shaw*, 3 My. & K. 190, and M. L. A. Act, 1856); and whether or not he knew at the time of becoming surety that the creditor held such securities; a right which was called in Latin the *beneficium cedendarum actionum*.

Where there are two or more sureties for one and the same debt, they have in English Law no right (as they had in Roman Law under the *Epistula Hadriani*) to require the creditor to split his demand equally between or amongst all the solvent co-sureties (*beneficium divisionis*), but in lieu thereof they have what is called the

SURETYSHIP—*continued.*

right of contribution as against each other, where one or more have paid the entire debt. At Law this right of contribution is regulated by the original number of co-sureties (*Batard v. Hawes*, 2 El. & Bl. 287), but in Equity by the number of those who are solvent at the time of payment (*Peter v. Rich*, 1 Ch. Rep. 19); and for this purpose it does not matter whether all the co-sureties are by one instrument or by several instruments (*Dering v. Earl of Winchelsea*, 1 W. & T. L. C. 89), provided they are equally upon a line as sureties for one common debt, and not one for one part only and the others for the other part of the debt (*Coope v. Trynam*, 1 T. & R. 426), or some as being only collaterally liable in *subsidium* of the others. *Swain v. Wall*, 1 Ch. Rep. 149.

SURMISE. This word commonly denotes to suspect, conjecture, or suggest. In former times, where a defendant in an action pleaded a local custom—as, e.g., a custom of the City of London—it was necessary for him “to surmise,” that is, to suggest, that such custom should be certified to the Court by the mouth of the Recorder, and without such a “surmise” the issue was to be tried by the country, as other issues of fact are. 1 Burr. 251; Vin. Abr. 246 (G.).

SURREBUTTER: See title REBUTTER.

SURREJOINDER: See title REJOINDER.

SURRENDER. A surrender is of a nature directly the reverse of a release; for as the latter operates by the greater estate descending upon the less, so a surrender operates by the falling of a less estate into a greater. It is defined by Lord Coke to be the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may down by mutual agreement between them. The person who so surrenders is termed the surrenderor, and the person to whom he surrenders is termed the surrenderee.

See title CONVEYANCES.

SURRENDER OF COPYHOLDS. The mode of conveying or transferring copyhold property from one person to another is by means of a surrender, which consists in the yielding up of the estate by the tenant into the hands of the lord for such purposes as are expressed in the surrender. The process in most manors is for the tenant to come to the steward either in Court or out of Court, or else to two customary tenants of the same manor, provided there be a custom to warrant it, and there by delivering up a rod, a glove, or other symbol, as

SURRENDER OF COPYHOLDS—*contd.*

the custom directs, to resign into the hands of the lord, by the hands and acceptance of his steward, or of the said two tenants, all his interest and title to the estate; in trust, to be again granted out by the lord to such persons and for such uses as are named in the surrender, and as the custom of the manor will warrant. Formerly, such a surrender was wanted in order to devise copyholds; but it was rendered unnecessary by Preston's Act, 1815 (55 Geo. 3, c. 192). A surrender in the case of legal estates tail in copyholds is at the present day the only mode of barring same (3 & 4 Will. 4, c. 74); but in the case of equitable estates tail in copyholds, either a surrender or a disentailing deed may be used for that purpose. 3 & 4 Will. 4, c. 74.

SURROGATE. One who is appointed or substituted in the place of another, most commonly in the place of a bishop, or a bishop's chancellor. He usually presided in the bishop's diocesan court, and as the representative of the ordinary granted letters of administration where the spiritual court was not presided over by a judge. Upon the death of the judges of the Ecclesiastical Courts in the sees of Canterbury and London, the surrogates of such Courts were by Act of Parliament directed to perform their duties until the appointment of their successors. 3 Burn's Ecc. Law, 667, 229; stat. 10 Geo. 4, c. 53, s. 13.

SURVIVORSHIP. One of the incidents of joint estates is what is termed the doctrine of survivorship, by which, when two or more persons are seized of a joint estate of inheritance for their own lives, or *pur autre vie*, or are jointly possessed of a chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate. This incident does not attach to estates held by tenancy in common; but in the case of these latter tenancies it is not unusual to insert a clause of survivorship or accrual as it is called. There is this difference between the accrual in joint tenancies which is implied by law, and the accrual in common tenancies which is expressed in the words of the deed, that whereas the former takes place repeatedly, as often as the event arises, the latter is confined to the original shares only of the tenants, and does not extend also to the shares accrued by the accrual, it being a maxim of law as to the express clause that (in the absence of express words) there is “no survivorship upon survivorship” (*Paris*

SURVIVORSHIP—continued.

v. Benson, 3 Atk. 80). Usually, also, there is no survivorship implied at law as between partners; moreover, the Court of Chancery will defeat survivorship upon very slight distinctions.

See title **JOINT TENANCY**.

SUSPENSE, SUSPENSION. A temporary stop or suspension of a man's rights; as when a seigniority rent, &c., on account of the unity of possession thereof, and of the land out of which it issues, are not in case for a time, but may be revived at some future time; and thus suspension differs from extinguishment, which would extinguish or annihilate the rent for ever. The word "suspension" is also applied to the depriving of an ecclesiastic of the profits and privileges of his benefice. See also a like use of the word in the case of *Easements*, *supra*.

T.

TACKING. This word denotes annexing, and as applied to mortgages it signifies the annexation of a subsequent to some prior charge. This is its chief application in law; but under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 7, the doctrine of tacking has been abolished as from the 7th August, 1874. The law prior to that date was expressed in the following rules, which are principally taken from the celebrated case of *Brace v. Marlborough (Duchess)*, 2 P. Wms. 491:—

(1.) A third mortgagee buying in a first mortgage, being a legal mortgage, might annex his third mortgage to the first, so as to squeeze out, i.e., get paid before, the second or mesne mortgage;

(2.) One who is a legal mortgagee to begin with, and who afterwards advances a further sum upon a judgment, might in like manner annex his judgment to his mortgage; but one who was a judgment creditor to begin with could not annex his judgment to a first legal mortgage which he might afterwards obtain a transfer of;

(3.) Tacking is excluded when all the mortgages are equitable; also, where the third mortgage or the subsequent judgment is made or obtained with notice of the second or mesne mortgage. (See title **NOTICE**.)

The doctrine of *Consolidation* may be taken to have fallen with the abolition of tacking, for it was a gross abuse of the doctrine of tacking. It was this,—A mortgagee or the purchaser from him could not redeem one or any of two or more estates in mortgage (whether originally or by successive transfers) to the same individual without redeeming them all, for the mortgagee might heap up, i.e., consolidate, all his

TACKING—continued.

mortgages upon one estate. *Selby v. Pomfret*, 1 J. & H. 336; *Bevor v. Luek*, L. R. 4 Eq. 537.

TAIL (from the Fr. *tailleur*, to cut or to carve). This word, used in conjunction with the word "estate" or the word "fee," signifies an estate of inheritance, descendible to some particular heirs only of the person to whom it is granted, in contradistinction to an estate in fee simple, which is an estate descendible to the heirs general (without distinction) of the person to whom it is granted. An estate tail is of two kinds, general and special. When lands are given to a man and the heirs of his body without any further restriction, this is called an estate tail general; because how often soever such donee in tail be married, his issue by every such marriage is capable of inheriting the estate tail. But if the gift is restrained or limited to certain heirs of the donee's body, exclusively of others, as in the case of lands being given to a man and the heirs of his body on Mary his present wife to be begotten, this is an estate tail special, because the issue of the donee by any other wife is excluded.

Estate tails are also distinguished into estates tail male and estates tail female. When lands are given to a person and the heirs male of his or her body, this is called an estate tail male, and to which the female heirs are not capable of inheriting. On the other hand, when lands are given to a person and the heirs female of his or her body, this is called an estate tail female, and to which the male heirs are not capable of inheriting. The person who holds an estate tail is termed a tenant in tail. And when a person grants land to a man and his particular heirs in the manner above described (i.e., when he creates an estate tail), such person is said to entail his lands. 1 Cruise, 78, 79; *Les Termes de la Ley*.

Estate tails exist chiefly in lands of freehold tenure, the statute *De Donis Conditionalibus* (13 Edw. 1, c. 1) upon which they depend speaking only of "tenements of inheritance." However, certain manors having, in imitation of the Courts at Westminster, introduced into their Courts the analogy of the statute, while other manors have persistently excluded it, it follows that in manors of the former class an estate tail in copyhold lands may and does exist, and arises in virtue of the same words as the like estate in freehold lands; whereas in manors of the latter class an estate tail does not exist, but a *donum conditionale* only, i.e., a fee simple conditional at Common Law, as was the case with all like gifts of freehold lands before the Statute *De Donis*.

Personal estate cannot be entailed; and words of limitation which would confer an

TAIL—continued.

estate tail in freehold lands give a fee simple absolute in leasehold lands (*Leven-thorpe v. Ashbie*, Tud. Conv. 763), or *quere* (if executory) a fee simple conditional. *Earl of Stafford v. Buckley*, 2 Ves. Sen. 170.

See also title **ESTATE**.

TAKING, FELONIOUS: See title **LARCENY**.

TALES. When by means of challenges, or any other cause, a sufficient number of unexceptional jurors does not appear at the trial, either party may pray a *tales* as it is termed; that is, a supply of such men as are summoned on the first panel in order to make up the deficiency. For this purpose a writ of *decem tales, octo tales*, and the like, used to be issued to the sheriff at Common Law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes or *nisi prius*, by virtue of the stat. 35 Hen. 8, c. 6, and other subsequent statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus*, i.e., of the bystanders or of persons present in the Court, to be joined to the other jurors to try the cause, who, however, are liable to the same challenges as the principal jurors. This is usually done *toties quoties* till the legal number of twelve is completed. 1 Inst. 155.

TALITER PROCESSUM EST. When pleading the judgment of an inferior Court the proceedings preliminary to such judgment, and on which the same was founded, must, to some extent, appear in the pleading; but the rule is that they may be alleged with a *taliter processum est*, i.e., with a general assertion that "such proceedings were had," instead of a detailed account of the proceedings themselves; thus, "that A. B. at a certain Court, &c., held at, &c., levied his plaint against C. D. in a certain plea of, &c., for a cause of action arising within the jurisdiction, and thereupon such proceedings were had that afterwards, &c., it was considered by the said Court that A. B. should recover against the said C. D." (1 Wms. Saund. 112, 113; Steph. Pl. 369, 5th ed.) A like concise mode of stating former proceedings in a suit is adopted at the present day in Chancery proceedings upon Petitions and in Bills of Revivor and Supplement. See *Pemberton* on that subject.

TALLAGE. This word is said to be used metaphorically for a share of a man's substance, paid by way of tribute, toll, or tax; being derived from the French *tailleur*, which signifies a piece cut out of the whole. Cowel.

See title **TAXATION**.

TAXATION. In early Anglo-Norman times, taxation was twofold:—

- (1.) Taxes upon land, and being either
 - (a.) On military tenants; or
 - (b.) On socage tenants, thereof; and
- (2.) Taxes upon persons other than landowners, being the taxes commonly called *tallages*.

The taxes of the first class were nothing more than the incidents of tenure, viz., aids, reliefs, wardships, marriages, escheats, and the like, the amounts of which were regulated by Magna Charta, 1215. The taxes of the second class were granted by the Commons in Parliament; and it is regarding these latter taxes that most of the statutes protecting the subjects' property against illegal taxation have been made, chief amongst which is the *Statutum de Tallagio non Concedendo* (25 Edw. 1). But the king also derived a large revenue from his hereditary domains.

In later times fresh sources of revenue were opened up, namely:—

- (1.) The *custuma antiqua sive magna*, being customs granted for the first time in 25 Edw. 1, and falling upon wool, woofels, and leather, exported and imported;
- (2.) The *custuma nova sive parva*, being customs granted for the first time in 31 Edw. 1, and falling upon merchant strangers exclusively, and being in addition to their assessment under the *custuma antiqua sive magna*;
- (3.) Butlirage, being a charge of 2s. on every *tun* of wine imported by merchant strangers; and
- (4.) Prissage, being a charge of 20s. for one *tun* before and another behind the mast, and falling upon English merchants having 20 tons of wine or more on board.

Two other modes of raising a revenue were given to the sovereign by special Acts of Parliament, passed usually at the commencement of each reign, viz.:—

- (1.) Tonnage and Poundage, the former on wine and the latter on dry goods; and
- (2.) Aids, being chiefly tenths and fifteenths of moveable goods.

The king also, in virtue of his prerogative, or of an assumed prerogative, exercised other modes of raising a revenue, viz.:—

- (1.) Purveyance;
- (2.) Benevolences;
- (3.) Forced loans; and
- (4.) Fines, forfeitures, and penalties.

In 12 Car. 2, when the feudal tenures were commuted into socage tenures, the revenue from the feudal dues was taken away, and in lieu thereof the excise duties were given to the king; but afterwards,

TAXATION—continued.

in 1692, an equivalent for the feudal dues was re-imposed on land in the shape of the *land-tax*, which in 38 Geo. 3, was fixed at 4s. in the pound, and made perpetual.

TAXING COSTS. There are certain officers in the Courts of Common Law who are appointed to examine the items in attorneys' bills, and to make such deductions as they think proper to be made; this process of examining the bills, and making the proper deductions, is technically termed *taxing costs*. The officers who perform this duty are the masters of the respective Courts; and when a master has so examined a bill (or taxed the costs, as it is termed), and has deducted the items which he has thought proper to disallow from the gross amount, he marks down the remaining sum which is to be allowed, and this remaining sum is thence called the master's *allocatur*. In the Courts of Chancery there are similar officers called *Taxing Masters*, whose duties are the same in respect of Chancery proceedings, and the result of their taxation is embodied in their certificate.

The taxation of costs may be made on either of two scales, that is to say, either (1.) As between solicitor and client, which is the more liberal; or (2.) As between party and party, which is the less liberal scale.

At any time before the taxing master's certificate is signed, any party dissatisfied therewith may apply to the master for a warrant to review the taxation; and may also apply by summons at Chambers for an order to review the taxation, such review extending only to matters objected to before the master.

TELEGRAPHS. Under the stat. 31 & 32 Vict. c. 110, and the Amendment Act, 32 & 33 Vict. c. 73, the Government, in its Postmaster-General, was authorized to acquire, work, and maintain electric telegraphs, for the use of the public, having previously only had the use thereof in common with the public. The telegraph company (and now, *semble*, the Government) is not answerable for the consequences of a mistake in transmitting the message on the wires (*McAndrew v. Electric Telegraph Company*, 17 C. B. 3). Telegraph messages are not privileged from production for purposes of evidence in Courts of Justice. *In re Waddell*, 8 Jur. (N.S.) 181.

TELLERS. Four officers in the Exchequer so called, whose duty it was to receive all moneys due to the king, and to give the clerk of the pells a bill to charge

TELLERS—continued.

him therewith. They also paid all persons any money payable by the king, by warrant from the auditor of the receipt, and made weekly and yearly books of their receipts and payments, which they delivered to the Lord Treasurer. Cowel.
See also next title.

TELLERS IN PARLIAMENT. In the language of Parliament, the "tellers" are the members of the House selected to count the members when a division takes place. In the House of Lords a division is effected by the "non-contents" remaining within the bar, and the "contents" going below it; a teller being appointed for each party. In the Commons the "ayes" go into the lobby at one end of the House, and the "noes" into a lobby at the other end, the House itself being perfectly empty. The Speaker then appoints two tellers for each party, and of each two there is one for the ayes and one for the noes put together, in order that they may act as a check upon each other. On the return of the members into the House their names are ascertained by the clerks, who, having in their hands alphabetical lists printed on large pieces of cardboard, put a mark against the name of each as he passes. In this manner, a division of a full House will be effected in little more than a quarter of an hour. *May's Treatise on Parliament.*

TEMPORALITIES OF BISHOPS: *See* title SPIRITUALITIES OF A BISHOP.

TENANT (*tenens*, from *tenere*, to hold). This word conveys a much more comprehensive idea in the language of the law than it does in its popular sense. In popular language, it is used more particularly as opposed to the word "landlord;" and always seems to imply that the land or property is not the tenant's own, but belongs to some other person, of whom he immediately holds it. But in the language of the law, every possessor of landed property is called a tenant, with reference to such property; and this, whether such landed property is absolutely his own, or whether he merely holds it under a lease for a certain number of years. The reason of it is, that almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and holden of, some superior lord, in consideration of some service to be rendered to the lord by the tenant or possessor of this property. Tenants are distinguished, according to the nature of the estate which they hold, by appropriate and corresponding terms. Thus, a person who holds an estate in

TENANT—continued.

See **single** in relation with reference to such estate as tenant in fee simple. If the tenant with a life or term of years in an estate has, as a tenant, with reference to such estate, a tenant in tail, this is an estate for years, as in the case of tenant in fee simple, and so on. The wife tenant, therefore, who holds in a joint or several property with a person in fee simple or in possession of an estate of some kind or other, this estate of the estate is a tenant by descent, or tenant by purchase, or tenant by gift, according to the way the estate is acquired. See also **tenancy** in relation with the word "tenant" as the word "in fee simple" and "in tail" and "for years" and "at will" as over and above the extent of interest which the tenant has in the whole or part of the estate.

See also **Life Estate**; **TENURE**; and **succession** titles.

TENANT IN COMMON. Tenants in common are generally defined to be such as hold by several and distinct titles, but by unity of possession, because once known to a man severally, and therefore they all occupy *pro indiviso*.

See also title **ESTATE**.

TENANT BY THE CURTESY: See title **CURTESY OF ENGLAND**; also title **ESTATE**.

TENANT TO THE PRINCIPLE: See title **RECOVERY**.

TENANT AT SUFFERANCE: See title **SUFFERANCE**.

TENANT IN TAIL: See title **TAIL**.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED. The meaning of this title may be thus explained. Supposing lands to be given to a man and the heirs of his body on Mary his present wife to be begotten; such a man, with reference to the lands which he holds in such a restricted form is called a tenant in tail. Now, if his wife Mary should happen to die without leaving issue, or having left issue, such issue should die also, he would then be called a tenant in tail after possibility of issue extinct; that is, the possibility of his having issue which could inherit the lands, would, on account of the death of his wife, be extinct, or extinguished; or, in other words, such a possibility could no longer exist, because Mary his wife, who was the only source from which he could derive issue capable of inheriting according to the terms of the gift, was dead, and therefore he would now be a tenant in tail after the possibility of his having issue (that is, by his wife Mary) had become extinct. Such a tenant cannot bar the estate tail; but in consideration of the omniscience of his estate, which is greater than that of an estate for life,

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED—continued.

he is depreciable for waste, not being waste and improvement.

TENANT IN TAIL EX PROVERBIO VIRI. Where an owner of lands upon or previously to marrying a wife, settled lands upon himself and his wife, and the heirs of their two bodies begotten, and then died, the wife as survivor became tenant in tail of the husband's lands in consequence of the husband's provision (or provisions *vir*). Originally she could bar the estate tail like any other tenant in tail; but the husband's intention having been merely to provide for her during her widowhood, and not to enable her to bar his children of their inheritance, she was very early restrained from so doing by the stat. 32 Hen. 8, c. 36.

TENANT AT WILL: See title **WILL**, **ESTATE AT**.

TENDER. In order to a valid tender the money tendered must be actually produced, unless the creditor dispenses with the production of it at the time (*Thomas v. Braden*, 10 East, 101). The tender must also be unconditional; and for this purpose, in case a receipt is wanted, the debtor should bring a stamped receipt with him, and require the creditor to sign it, and to pay the amount of the stamp. *Laing v. Meador*, 1 C. & P. 257.

See also next title.

TENDER, PLEA OF. Signifies a plea by which the defendant alleges that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into Court ready to be paid to him, &c. (Steph. Pl. 247; Bull. & L. Prec. in Pl. 693.) The plea of tender must be accompanied by an actual payment of the amount into Court, such payment being in fact stated in the plea. The plea amounts to an admission of the cause of action.

TENDERING ISSUE. If in the pleadings in an action the defendant traverses or denies some allegation of fact put forward by the plaintiff in his declaration or other pleading, it is evident that a question is at once raised between the parties as to the existence or non-existence, truth or falsehood, of the fact to which the traverse or denying is directed. A question being thus raised, or, in other words, the parties having arrived at a specific point, or matter affirmed on the one side and denied on the other, the defendant (as the party traversing) is obliged to offer to refer this question to the proper mode of trial, which he does by annexing to the traverse an appropriate formula indicative of such

TENDERING ISSUE—*continued.*

offer, and in so doing he is said to "tender issue." Where the question for trial is one of fact, the formula is simply as follows: "and of this the defendant puts himself upon the country," &c., meaning that, with regard to the question in issue, he throws himself upon a jury of his country. It must be observed, however, that other issues besides those of fact are frequently tendered. Steph. Pl. 59, 60, 5th ed.

See also title **ISSUE**.

TENEMENT. This word has a very comprehensive signification in law, including within its compass every species of real property which may be held, or in respect of which a person may be a tenant. The word is used in the following manner by Blackstone. "Almost all the real property of this kingdom is by the policy of our laws supposed to be granted by, dependent upon, and *holden* of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of his property. The thing holden is, therefore, styled a tenement, the possessor thereof a tenant, and the manner of his possession a tenure." As thus used, the word "*tenement*" extendeth to land and messuages of all three varieties, whether freehold, copyhold, or leasehold. It is the most general word for all real property subjects. Sometimes, and not uncommonly in popular usage, it denotes simply a house, *e.g.*, in the phrase "all that messuage or tenement."

See also title **TENURE**.

TENENDUM. That formal part of a deed which is characterised by the words "to hold." It was formerly used to express the tenure by which the estate granted was to be held; but since all freehold tenures have been converted into socage, the *tenendum* is of no further use, and is therefore joined in the *habendum*. 4 Cruise, 26.

TENTERDEN'S ACT (LORD). The 9 Geo. 4, c. 14, is so called, which is declared to be "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements."

These are four in number, that is to say:—

- (1.) A promise to bar the Statute of Limitations (s. 1);
- (2.) A promise by an adult to pay a debt contracted by him during infancy (s. 5);*

* By Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), this section of Lord Tenterden's Act seems to be in effect repealed.

TENTERDEN'S ACT (LORD)—*contd.*

- (3.) Representations of ability in trade, upon the strength of which credit is intended to be given (s. 6); and
- (4.) Contracts for the sale of goods amounting in price to £10 or upwards, notwithstanding such goods have yet to be made or finished (s. 7).

TENTHS. Tenths and fifteenths were temporary aids issuing out of personal property, and granted to the King by Parliament. They were formerly the real or actual tenth or fifteenth part of all the moveables belonging to the subject; where such moveable or personal estates were a very different and much less considerable thing than they are at present (*see* further, title **TAXATION**). Ecclesiastical tenths were of a somewhat different nature, being the tenth part of the annual profit of each living, which, with the first fruits (or the first year's profit of the living), was claimed by the Holy See from the clergy of the English Church, under the supposed authority of a precept of the Levitical law. At the time of the Reformation the clergy continued to pay the same tax, but then paid it to the king, who had become head of the church; but upon the accession of Queen Anne, that queen abandoned this source of revenue, and allotted it to trustees for the purpose of augmenting poor livings.

See titles **FIRST FRUITS**; **QUEEN ANNE'S BOUNTY**.

TENURE. Tenure signifies the system of holding lands or tenements in subordination to some superior, and which in the feudal ages was the leading characteristic of real property. The king, who was at once the source of property and the fountain of justice and honour, had bestowed large territories on the great barons who immediately surrounded the throne, and these again had distributed his bounty through the channels of their numerous dependants. In legal contemplation, at least, all the landowners of the kingdom thus derived their estates. On this hypothesis, so consonant to the genius and history of feuds, the system of tenure was built; a system which linked every feudatory, by a chain more or less extended, to the Crown, and rendered his fief eventually liable to resumption by the sovereign power from which it had, or was assumed to have, originally emanated. The nature of the tenure, or, in other words, the manner in which lands were held, was characterised by appropriate terms; thus, lands held by the honourable tenure of military service, that is, in consideration of attending or assisting the lord in the wars, &c., were distinguished

TENURE—*continued.*

by the corresponding term of tenure by knight service, &c. Out of this system arose the relation of lord and vassal, corresponding to a certain extent with the landlord and tenant of the present age. To this system we may also refer the origin of the present legal assumption, that every possessor of real property is a tenant in respect of that property; that he is still considered as holding it of some superior lord, and therefore is a tenant in reference to such lord. To this system may also be referred the origin of the present freehold and copyhold tenures, into the one or the other of which nearly all the various tenures which existed during the period of feudal rigour have merged. Such is a general idea of the nature of tenure; the different kinds of tenure will be found under their respective titles; and see also titles, **ESTATES**, **FEDERAL TENURES**, and next following title.

TENURE OF LAND, HISTORY OF. It is a disputed question whether tenure existed in Anglo-Saxon times. It is the opinion of Spelman, Madox, Wright, Blackstone, and Williams, that no tenure existed till 1066. On the other hand, Hallam mentions that writers of equal authority (whose names, however, he significantly does not give) have held a different theory; and he himself is of opinion, that if actual tenure did not exist, at least something very closely analogous to it did exist in Anglo-Saxon times.

It is true that in Anglo-Saxon times all lands were subject to services or burdens; namely,—

- (1.) Military services in defensive war;
- (2.) The repair of roads and bridges; and
- (3.) The maintenance of royal fortresses; these being the three burdens comprised in the *trinoda necessitas*. But it appears that for the neglect to render these services the Anglo-Saxon owner did not forfeit his lands, but at the most was liable in damages only; whereas in Anglo-Norman times the holder in case he neglected the services that were due and owing from him forfeited the lands, and was not liable in damages merely, these services being the condition of his continuing to hold the lands. In brief, the Anglo-Norman services were annexed to the tenure of the lands, whereas the Anglo-Saxon services were annexed to the lands themselves; and therein precisely consists the distinction between feudal estates and allodial ownerships.

It is true that the lands of England, being subject in Anglo-Saxon times to the services of the *trinoda necessitas*, were fitted to receive readily and naturally the

TENURE OF LAND, HISTORY OF—*continued.*

peculiar impress of feudalism; the difference between annexing the services to the tenure and annexing them to the lands was very slight. That, however, is no reason for confounding two distinct things, or for saying that things which were analogous merely are identical; and the English lawyer knows, therefore, of no tenure prior to 1066.

TERM. The word "term" is commonly used in two senses; (1.) As signifying those four periods of the year during which the Courts at Westminster sit to hear and determine points of law, and transact other legal business of importance, and which are called respectively Hilary, Easter, Trinity, and Michaelmas Terms. It was proposed by the Judicature Act, 1873, to abolish the distinction of terms from sittings after term; but the proposed abolition is rather nominal than real, like most of the other proposed changes of that Act; and the Act itself has been postponed in its operation. (2.) As signifying the bounds, limitation, or extent of time, for which an estate is granted; as when a man holds an estate for any limited or specific number of years, which is called his term, and he himself is called, with reference to the term he so holds, the termor, or tenant of the term. A term of years, considered as an estate or interest in lands, is but a partake, or portion, of some larger or greater estate or interest in the same lands, and hence is, with reference to such larger estate, termed a particular estate. The largest estate or interest which a person can have is obviously the entire ownership or inheritance, which may be termed the root or stock from which all particular estates or limited interests in the same lands are derived. A term of years is said to be either outstanding, i.e., in gross, or attendant upon the inheritance. It is outstanding or in gross when it is unattached or disconnected with the estate or inheritance, as where it is in the hands of some third party having no interest in the inheritance; it is attendant when vested in some trustee in trust for the owner of the inheritance. Thus, supposing A. to be the owner of the inheritance, and to have occasion for a loan of £1000, which B. is willing to advance. A. may lease the land to B. for a term of 1000 years, not reserving any rent, or reserving only a nominal rent, the lease containing a clause that if A. repays the sum of £1000 with interest to B. on a given day, the term shall cease; the payment is not, in fact, made on the day, so that the clause of *cesser* becomes wholly nugatory; but on a subsequent day A. pays B. the principal

TERM—*continued.*

and interest. What is now to become of the term? The purpose for which it was granted has been satisfied, but still the term continues to exist, and resides in B., who by virtue thereof is entitled in a Court of Law to recover the possession of the land for the remaining portion of the term. In point of conscience, it is true that B. ought to restore, and in a Court of Equity he would be compelled to restore, the land to A. The only mode, therefore, of withdrawing from B. the legal ownership in the land, which he has now, in an equitable point of view, no longer any right to enjoy, is either to induce B. to surrender the term to A., by which, by the operation of a legal doctrine termed "merger" (see that title), the term would be absorbed in the inheritance, and would cease to have any continued existence; or to procure him to make a transfer or assignment of his interest in the term to some third party as a trustee for A., to the intent that such third party shall hold the term solely for the benefit of A.'s inheritance. This latter course is that which for many reasons is frequently had recourse to in preference to the former, and when a term has been thus transferred or assigned, it is technically said to "attend upon the inheritance," because whosoever becomes entitled to the inheritance would be equitably entitled to such term as belonging to it, and the term itself is thence called an "attendant term."

Such attendant terms were frequently of great use in protecting the estate of a purchaser against prior *unknown* incumbrances; but being also liable to abuse, it has been provided by the Satisfied Terms Act (8 & 9 Vict. c. 112), that terms already attendant on the 31st of December, 1845, and also terms becoming attendant subsequently to that date, shall absolutely cease; but as to the former, where they are attendant by express declaration only, they are to continue (although non-existing) to afford the old protection.

TERM FEE. A small fee or allowance which an attorney in a cause is entitled to for every term in which any step is taken in the cause, from the time of the delivery of the declaration until final judgment. The term for this purpose is considered as including the following vacation, so that if any step in the cause is taken between one term and another, as, for instance, between Michaelmas and Hilary Terms, *i.e.*, in Michaelmas vacation, the attorney will be entitled to his fee for Michaelmas Term the same as if the step had been actually taken in the term itself. The amount of the fee varies from 13s. to 20s.

TERMINUM QUI PRETERIIT, WRIT OF ENTRY AD. A writ which lay for the reversioner, when the possession was withheld by the lessee, or a stranger, after the determination of a lease for years.

TERRE-TENANT. He who is literally in the occupation or possession of the land, as distinguished from the mere owner of the same. The phrase also denotes sometimes the owner of the legal estate, *e.g.*, the trustee's estate; and in that sense, although the *cestui que trust* should die without heirs, the lands will not escheat to the lord for want of a tenant (*per defectum sanguinis*), for the trustee is the terre-tenant. *Burgess v. Wheate*, 1 Eden, 177.

TEST AND CORPORATION ACTS. Were Acts passed for the better securing the Established Church against perils from Nonconformists of all denominations, infidels, Turks, Jews, heretics, Papists, and sectaries. By the latter Act no person could be legally elected to any office relating to the government of any city or corporation unless within the previous twelvemonth he had received the Sacrament of the Lord's Supper according to the rites of the Church of England; and he was also enjoined to take the oaths of allegiance and supremacy at the same time that he took the oath of office. The former Act, or Test Act, directed all officers, civil and military, to take the oaths, and make the declaration against transubstantiation in any of the King's Courts at Westminster, or at the quarter sessions, within six calendar months after their appointment, and also within the same time to receive the Sacrament of the Lord's Supper, according to the usage of the Church of England, in some public church immediately after Divine Service and sermon, and to deliver into the Court a certificate thereof, signed by the minister and churchwarden, and also to prove the same by two credible witnesses, under a forfeiture of £500, and disability to hold the office.

See also title **STATUTES**, sub-title **ECCLIASTICAL**.

TESTAMENT: See title **WILL**.

TESTAMENTARY CAUSES. Are causes that were cognizable formerly in the Ecclesiastical Courts, and which are now cognizable in the Court of Probate, concerning last wills and testaments.

TESTAMENTARY GUARDIAN. A person appointed by a father in his last will and testament to be the guardian of his child until he or she attains the age of twenty-one years. The power of appointing such a guardian was first conferred on the father by stat. 12 Car. 2, c. 24.

See title **GUARDIAN**.

TESTATOR. The person who makes a will or testament is so called.

See also title **INTESTATE**.

TESTATUM. This is the name given to those words in a deed, beginning, "*Now this Indenture witnesseth.*"

See title **DEED**.

TESTATUM WRIT. When a writ of execution had been directed to a sheriff of a county, and that sheriff returned that there were no goods of the defendant in his bailiwick, then a second writ, reciting this former writ and the sheriff's answer to the same, might be directed to the sheriff of some other county wherein the defendant was supposed to have goods, commanding him to make execution of the same; and this second writ was called a *testatum writ*, from the words in which the writ was concluded, viz., "Whereupon, on behalf of the said plaintiff, it is testified in our said Court that the said defendant has goods, &c., within your bailiwick." But now by the C. L. P. Act, 1 & 2, s. 121, it shall not be necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to and executed by the sheriff of any county, whether a county palatine or not, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county. So that the *testatum* clause in the second writ (being now the only writ), is omitted, and the *testatum* writ may be regarded as being in that indirect manner abolished.

TESTE. The tests of a writ is that clause at the bottom of a writ beginning with the word "witness." When, therefore, a writ is said to be tested in the name of such or such a judge, it means that it is witnessed in his name.

TESTES, PROOF OF WILL PER. When the validity of a will is contested, the executor, instead of proving it in the common form, i.e., upon his own oath simply, before the registrar of the Court of Probate, proves it *per testes* (by witnesses) and in open Court. When a will is so proved, two witnesses are by the Civil Law indispensable; although it does not appear to be necessary that they should have read the will, or even heard it read, provided they can depose on oath that the testator declared that the writing produced was his last will and testament, or that he duly executed the same in their presence.

Two witnesses seem also to have been at one time required by the English Law in such a case (Godol. 66; Toll. Ex. 57); but at the present day, the mode of proof is stated to be as follows:—

TESTES, PROOF OF WILL PER—cont.

"Where a will requiring attestation is subscribed by several witnesses, it is only necessary at Law to call one of them; and the same rule prevails in Chancery, excepting in the case of *wills*, with respect to which it has for many years been the invariable practice to require that all the witnesses who are in England and capable of being called shall be examined." Best on Evidence, 760.

TESTES, TRIAL PER. Is a trial had before a judge without the intervention of a jury; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined; but this mode of trial, although common in the Civil Law, is seldom resorted to in the practice of the Common Law. 3 Ch. Bl. 336, and n. (4).

TESTIMONIAL. A certificate under the hands of a justice of the peace testifying the place and time when and where a soldier or mariner landed, and the place of his dwelling and birth, whether he is to pass (Cowel; 3 Inst. 85). The document holds a kind of doubtful position midway between a certificate and a permit, or pass.

THANE. Thanes were those important personages who attended, i.e., ministered, upon the Anglo-Saxon kings in their Courts, and who held their lands immediately of those kings. That portion of the king's land of which a thane was the ruler or governor, was termed "thaneage of the king;" and such lands as the Saxon kings granted by charter to their thanes were denominated "thane lands." Cowel.

THEFT (furtum): See title **LARCENY**.

THEFT-BOTE. The offence of theft-bote arises by a party who has been robbed and knows the felon, taking his goods again, or receiving other amends upon agreement not to prosecute.

See title **COMPOUNDING FELONY**.

TIMBERLODE. A service which some tenants were bound to perform to their lords of carrying felled timber from the woods to the lord's house. Cowel.

TIMBER-TREES. In a legal sense timber-trees include oak, ash, and elm. In some places, however, by local custom, where other trees are commonly used for building, they are on that account considered as timber-trees. *Honywood v. Honywood*, L. R. 18 Eq. 306.

TIME. The calendar, as amended by the stat. 24 Geo. 2, cc. 23 and 30, is that which is now in use in England. With reference to *days*, there is no general rule

TIME—continued.

of law that in computing time the day is to be either inclusive or exclusive, but the reason of the thing, and the accompanying circumstances, are to decide (*Lester v. Garland*, 15 Ves. 248); the point is not unfrequently settled by statute in particular cases. Usually fractions of a day count as an entire day; but when it is necessary to shew which of two events happening on the same day first took place, the Court will consider such fractions (*Clinch v. Smith*, 8 D. P. C. 337). With reference to *months*, the stat. 13 & 14 Vict. c. 21, enacts, that "month" in all future statutes shall mean calendar month, and not lunar month, although the latter was the meaning by the Common Law (*Lecon v. Hooper*, 1 Esp. 246), unless where the intention indicated a different use of the word (*Lang v. Gale*, 1 M. & S. 111), or custom controlled the meaning (*Turner v. Barlow*, 3 F. & F. 946).

See also title MONTH.

TIME OUT OF MIND. Any period anterior to the reign of Richard I. Bract. l. 2, c. 22; 3 Lev. 160.

See also title LEGAL MEMORY.

TIPSTAFF. Tipstaves are officers who were formerly appointed by the marshal of the King's Bench Prison, or by the warden of the Fleet Prison, but who now, under the Act 25 & 26 Vict. c. 104 (Queen's Prison Discontinuance Act, 1862), are appointed by the respective chiefs of the Chancery, Queen's Bench, Common Pleas, and Exchequer divisions of the Court. They attend the King's Courts with a staff or rod tipped with silver, and take into their charge all prisoners committed by the Court. 1 Arch. Pract. 11; Cowel.

TITHES. A species of incorporeal hereditaments, defined to be the tenth part of the increase yearly arising and renewing (1) from the profits of the lands, (2) from the live-stock upon lands, and (3) from the personal industry of the inhabitants. The first species of tithe is usually called *predial*, and consists of corn, grass, hops, wood, and the like; the second *mixed*, as of wool, milk, pigs, &c., consisting, it will be observed, of natural products, but nurtured and preserved in part by the care of man; the third *personal*, as of manual occupations, trades, fisheries, and the like. The distinction between *predial* and *mixed* tithes is, that *predial* tithes (so called from *prædium*, a farm), are those which arise immediately out of the soil, either with or without the intervention of human industry; and *mixed* are those which arise immediately through the in-

TITHES—continued.

crease or produce of animals which receive their nutriment from the earth and its fruits. Personal tithes are so called because they arise entirely from the personal industry of man. In addition to this distinction, tithes have been divided into two classes, viz., great and small; the former comprehending in general the tithes of corn, peas, beans, hay, and wood; the latter, all other predial, together with all mixed and personal tithes. Tithes are great or small according to the nature of the things which yield the tithe, without reference to the quantity. Thus clover grass made into hay is of the nature of all other grass made into hay, and consequently is a great tithe: but if left for seed, its nature becomes altered, and, like other seed, it becomes a small tithe. 2 Chit. Bl. 24, and n. (6); Cowel.

See also titles APPROPRIATE; IMPROPRIATE.

TITHING. One of the civil divisions of the territory of this country, being a portion of that greater division called a hundred. It was so called because ten freeholders with their families composed one. It is said that they were all knit together in one society, and bound to the king for the peaceable behaviour of each other (see title FRANKPLEDGE). In each of these societies there was one chief or principal person, who, from his office, was called *teething-man*, now *tithing-man*. Mirr. c. 1, s. 3; Cowel.

See next title.

TITHING-MAN. During the Saxon times the officer who was appointed to preside over tithings and to examine and determine all causes of small importance between the inhabitants of adjacent tithings was so called. In the present day, however, tithing-men are a kind of constables, elected by parishes, and sworn in their offices in the Court Leet, and sometimes by justices of the peace, &c.

TITLE. This word may be defined generally to be the evidence of right which a person has to the possession of property. The word "title" certainly does not merely signify the right which a person has to the possession of property, because there are many instances in which a person may have the right to the possession of property, and at the same time have no title to the same. In its ordinary legal acceptance, however, it generally seems to imply a right of possession also. It therefore appears on the whole to signify the outward evidence of the right, rather than the mere right itself. Thus, when it is said that the "most imperfect degree of title consists in the mere naked possession

TITLE—continued.

or actual occupation of an estate," it means that the mere circumstance of occupying the estate is the weakest species of evidence of the occupier's right to such possession. The word is defined by Sir Edward Coke thus: "*Titulus est iudici causa præsidentis id quod modum est*" (1 Inst. 34); that is to say, the ground, whether purchase, gift, or other such ground of acquiring, *titulus* being distinguished in this respect from *modus acquirendi*, which is the *traditio*, i.e., delivery or conveyance of the thing.

See also title **ABSTRACT OF TITLE**.

TITLE OF ENTRY. The right or title to enter upon lands. Thus, when one seized of land in fee makes a feoffment of the same on condition, and that condition is afterwards broken, then the feoffor has title to enter into the land. Cowel.

TITLES OF CLERGYMEN. Before a candidate for holy orders can be ordained, he must obtain what is termed a title, which is either an appointment to a benefice actually vacant, or to a curacy, and also a letter from the clergyman who gives the title, signifying the reason which obliges him to appoint a curate. Eccl. Leg. Guide, 4.

TOFT. A messuage, or the site or piece of ground on which a messuage has stood; and the owner of a toft is termed a toftman. West. Symb.; Cowel.

TOLERATION ACT. The stat. 1 Will. & M. st. 1, c. 18, for exempting Protestant dissenters from the penalties of certain laws is so called.

See title **STATUTES**, sub-title **ECCLÉSIASTICAL**.

TOLL. This word has various significations. When used as a verb, it signifies to bar, to defeat, or to take away; thus, to toll the entry, signifies to deny or take away the right of entry. When used as a noun, it signifies either a liberty to buy or sell within the precinct of a manor, or a tribute or custom paid for passage. Cowel; *Les Termes de la Ley*; 1 M. & W. 19.

TONNAGE. A duty imposed by Parliament upon merchandize exported and imported, according to a certain rate upon every tun.

See title **TAXATION**.

TORT. A wrong or injury that is "independent of contract." Personal actions are founded either on contracts or on torts. The latter signify such wrongs as are in their nature distinguishable from more branches of contract, and are often mentioned as of three kinds, viz.: (1.) *Nonfeasance*, being the omission to do

TORT—continued.

some act which a person is bound to do. (2.) *Misfeasance*, being the improper doing of some act which he may lawfully do. (3.) *Malfeasance*, being the commission of some act which is positively unlawful. Actions founded upon tort are sometimes described as actions *ex delicto*, in distinction to actions *ex contractu*, which are founded upon contract. The forms of action generally founded upon tort are *trover*, *detinue*, *trespass*, *trespass on the case*, and *replevin*; whilst *debt*, *assumpsit*, and *covenant* belong to the class of actions founded upon contract. 1 Chit. Pl. 3.

TORTFEASOR (Fr. *tortfaisieur*). A wrongdoer, or a trespasser. There is no contribution between tortfeasors, like that which subsists between co-debtors. *Maryweather v. Niran*, 2 Sm. L. C. 481.

TORTURE: See title **PAINE**, **FOURTY** & **DURE**.

TRADE. All contracts in restraint of trade are regarded with disfavour by the law; and if the restraint is general, it is wholly void; and if it is partial, it is only good when the restraint is reasonable and a valuable consideration has been given by way of purchasing the restraint (*Mitchell v. Reynolds*, 1 Sm. L. C. 356). A reasonable restraint may be either in respect of locality or of time, or of both combined; and in every trade, what is reasonable in these respects varies with the character of the trade. It is from the like disfavour which the law bears towards such restraints that the stat. 54 Geo. 3, c. 96, a. 1, repealed the prohibitions contained in 5 Eliz. c. 4, whereby persons who had not served an apprenticeship were forbidden to be employed as journeymen, or to otherwise exercise their particular trades or occupations; and that the 7 & 8 Vict. c. 24, repealed a variety of other ancient Acts which operated in restraint of trade. There are, nevertheless, certain restraints which the law favours, and that chiefly from a regard to the public health; thus, the 11 & 12 Vict. c. 63, s. 64, forbids the establishment of new offensive trades unless with the consent of the local board of health; and the 16 & 17 Vict. c. 128, s. 1, renders liable to summary conviction persons carrying on offensive trades within the metropolis, when they do not use the best means of preventing annoyance to the neighbourhood.

See also next title.

TRADE-MARK. The right of a manufacturer to his own particular trade-mark is analogous to that of the owner of a patent or a copyright; there is, however, this difference between the right to a trade-mark and these latter rights, viz., that the

TRADE-MARKS—continued.

value of a trade-mark is independent of the article itself, and consists entirely in the reputation of the particular individual who makes or sells it, which is not the case in patented articles or in copyright works (see titles **PATENT** and **COPYRIGHT**). The law does not, indeed, recognise any property either in trade-names or in trade-marks; nevertheless, it will not encourage a fraud or deception; and, in the words of Lord Cranworth (*Farina v. Silverlock*, 6 De G. M. & G. 218), every one who has adopted a particular mode of designating his own manufacture has a right to say that other persons shall not sell the same article in such a way as to make purchasers believe that the article is his manufacture. The protection which the law secures to a trade-mark is therefore only a particular application of the general rule of law that it is a fraud to represent what the party knows to be untrue, where such representation is calculated from the mode in which it is made to induce another to act on the faith of it, so that he may incur damage, or where such representation will prejudice the reasonable profits of another man from his superior industry or invention. See **Adams on Trade-marks**.

TRADES-UNIONS. Combinations on the part either of employers or of *employees* to regulate the price of labour are, within certain limits, valid by the Common Law (*Rez v. Batt*, 6 C. & P. 329); but such combinations, when carried the length of violence in any phase or shape, are illegal. Wherefore the stat. 6 Geo. 4, c. 129, placed such combinations, on the part of *employees* chiefly, under a most rigorous restraint; and, under that statute, anything in the nature of a threat put forward with a view to forcing or endeavouring to force a workman to leave his employment was made a criminal offence (*Walsby v. Anley*, 3 El. & El. 516). Of recent years the stat. of Geo. 4 has been thought too rigorous, and under the stats. 22 Vict. c. 34, 32 & 33 Vict. c. 61, and 34 & 35 Vict. c. 31, combinations on the part of *employees*, or (as they are usually called) *Trades-Unions*, are recognised as legal associations with legitimate objects, and which objects they may endeavour to secure (if so advised) by pecuniary and other means of supporting strikes, &c., so long as they do not resort to open or secret violence, or to threats, intimidation, rattening, and the like.

TRANSACTION. In French Law is the *transactio* of Roman and the *compromise* of English Law, being an agreement to give up the residue (if any) of an unascertained debt, in consideration of the payment of an agreed sum.

TRANSITORY ACTIONS.

Actions are said to be either local or transitory; an action is local when all the principal facts on which it is founded are of a local character, and carry with them the idea of some certain place; these are generally such as relate to realty. An action is termed transitory when the principal fact on which it is founded is of a transitory kind, and might be supposed to have happened anywhere; and, therefore, all actions founded on debts, contracts, and such like matters relating to the person or personal property, come under this latter denomination (*Steph. Pl.* 316, 317). If the action is local, the *venue* also is local; and if the action is transitory, the *venue* also is transitory. But under the Judicature Act, 1873, Schedule, Rules of Procedure 28, there shall be no local *venue* for the trial of any action.

TRANSLATION. This word, as applied to a bishop, signifies removing him from one diocese to another. Cunningham.

TRAVERSE (from the Fr. *traverser*, to cross, or oppose). In the language of pleading signifies a denial. Thus, where a defendant denies any material allegation of fact in the plaintiff's declaration, he is said to traverse it, and the plea itself is thence frequently termed a traverse. Besides the common traverse, as explained above, there is one of occasional occurrence termed a special traverse, or traverse with an *absque hoc*. This, instead of being framed in the shape of a simple denial, consists ordinarily of two branches, one involving the introduction of new affirmative matter, which, inferentially or argumentatively, denies the disputed allegation of fact upon which the defendant purposes raising an issue; the other, being the *absque hoc* clause, consisting of a direct denial of such allegation of fact.

See title **SPECIAL TRAVERSE**; also title **ABSQUE HOC**.

TRAVERSE OF AN INDICTMENT. The word "traverse," as applied to an indictment, has the same import as when applied to a declaration; signifying to contradict or deny some principal matter of fact therein, *e.g.*, in a presentment against a person for a highway overflowed with water, for default of scouring a ditch, &c., he may allege that there is no highway, or that the ditch was sufficiently scoured. Cowel.

See title **TRAVERSE**.

TRAVERSE OF AN OFFICE. The proving that an inquisition made of lands or goods by the escheator is defective and untrue made. Kitchen, 227.

TRAVERSING NOTE. This is a pleading in Chancery, and consists of a denial

TRAVERSING NOTE—continued.

put in by the plaintiff on behalf of the defendant generally denying all the statements in the plaintiff's bill. The effect of it is to put the plaintiff upon proof of the whole contents of his bill, and is only resorted to for the purpose of saving time, and in a case where the plaintiff can safely dispense with an answer. A copy of the note must be served on the defendant; as to which see title **SERVICE**.

TREASON. This word, in its original sense, denoted the betrayal of confidence or of trust, and such betrayal was of two species, according as it was either

(1.) Against the King as supreme; or

(2.) Against a subject as superior;

the former species was called **High Treason**, and the latter **Petit Treason**.

Petit treason has been abolished by stat. 9 Geo. 4, c. 81, s. 2, although, of course, breach of confidence or trust, in so far as it is a civil wrong, is still a tort, and as such remediable in a Court of Law or (more commonly) of Equity.

High treason is, therefore, now called **treason** simply.

The charge of treason, being vague, was dangerous to the liberty of the subject; and inasmuch as trivial or dubious offences were imputed in the reign of Edward II. as treasonous under the designation of *acroachments* upon the royal power; therefore it was enacted by 25 Edw. 3, st. 5, c. 2, that the following offences (and none other) should be deemed treasons:—

- (1.) Compassing the death of the Sovereign, or his or her consort, or of the Prince of Wales;
- (2.) Violating the consort of the King, or his eldest daughter unmarried, or the Princess of Wales;
- (3.) Levying war against the Sovereign within the realm, or being adherent to such, or relieving same;
- (4.) Counterfeiting the King's money, or importing counterfeited money;
- (5.) Killing the Lord Chancellor or the Lord Treasurer, or any judge while on the bench; and generally,
- (6.) Committing such other offence or offences as should by any future Parliament be declared treason.

The general provision of the above-mentioned statute was put in exercise by Richard II., who enacted (21 Rich. 2, c. 3) that the mere intent to kill or depose the King should, without proof of any overt act of treason, amount to the offence of treason; but this statute was repealed by 1 Hen. 4, c. 10. Again, Henry VIII. enacted many new treasons, *e.g.*, denying the pre-nuptial chastity of Anne Boleyn, denying the King's right with the authority

TREASON—continued.

of Parliament to devise the Crown, and such like; but these new treasons were repealed by 1 Edw. 6, c. 12. In more modern times, the following treasons have been added permanently to the list enumerated in 25 Edw. 3, viz.:—

- (1.) Hindering from his accession to the Crown any one entitled next in succession under the Act of Settlement,—this by 1 Anne, st. 2, c. 17, s. 3;
- (2.) Declaring that the Sovereign, with the authority of Parliament, could not direct the devolution of the Crown,—this by 6 Anne, c. 7;
- (3.) Imagining the death, bodily harm, or imprisonment of the Sovereign, and expressing the same in writing or by overt act,—this by 36 Geo. 3, c. 7; and
- (4.) Forging the great seal,—this by 11 Geo. 4 & 1 Will. 4, c. 66, s. 2.

By the stat. 7 Will. 3, c. 3, no prosecutions for treason were to be brought but within *three* years from the alleged commission of the offence; and by the same statute, coupled with that of 7 Anne, c. 21, there must, in order to secure a conviction, be two witnesses to one and the same act of treason, or to different acts of the same treason. Moreover, by these two statutes a list of the witnesses for the prosecution, together with a copy of the indictment, is to be delivered to the prisoner *ten* days before the trial; also a copy of the panel of jurors *two* days before the trial. The prisoner is also allowed to make his defence by counsel.

Under the stat. 39 & 40 Geo. 3, c. 93, when the treason consists in an attempt to assassinate the Sovereign, the offence is made triable as *murder*, but continues punishable as treason; under the stat. 11 & 12 Vict. c. 12, it is made a *felony* to intend to depose the Sovereign, or to place duress upon her in order to compel her to change her counsels, or to intimidate either House of Parliament, or to incite any foreigner to invade the kingdom. Lastly, under the stat. 5 & 6 Vict. c. 51, s. 2, it is made a high misdemeanour to strike at the Sovereign or to discharge fire-arms near her person with intent to alarm her; and it makes no difference whether the pistol is loaded or not.

TREASURE-TROVE. Any money, coin, gold, silver, plate, or bullion *found* (*trouvé*) hidden in the earth, the owner thereof being unknown; such kind of treasure in general belongs to the king, and forms one of the precarious sources of his revenue. When, however, it is found in the sea or upon the earth it does not belong to the king, but to the finder in case no owner appears. In

TREASURE-TROVE—*continued.*

many cases treasure-trove belongs to the lord of the manor within whose limits it is found, by special grant or prescription. Cowel.

TREASURY BENCH. In the House of Commons the first row of seats on the right hand of the Speaker is so called, because occupied by the First Lord of the Treasury or principal Minister of the Crown.

TREBLE COSTS. Are three times the amount of the costs incurred by a party in an action, and the payment of such costs is by various statutes imposed as a punishment upon persons violating the provisions of those statutes. Thus by 29 Eliz. c. 4, the sheriff for extortion on final process is liable not only to pay treble damages (or three times the amount of the sum which he has extorted), but also treble costs, which is the amount of the plaintiff's costs reckoned three times over. 2 B. & Ald. 393; 1 Ch. Rep. 137; 2 Ch. Pl. 326, n. (A), 6th ed.

TREBUCKET. A certain engine of correction, in which persons convicted of the offence of being common scolds were placed; it was also called the castigatory or cucking stool, which latter is said to signify in the Saxon language scolding stool, though frequently corrupted into ducking stool, from the circumstance of the offender placed therein being plunged in the water for her punishment. 3 Inst. 219.

TRESPASS. This word, in its most comprehensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; and this, whether it relates to a man's person or to his property. In its more limited and ordinary sense, it signifies an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence though none is actually used, when the injury is of a direct and immediate kind, and committed on the person or tangible and corporeal property of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon a person's land. For the above offences an action of trespass lies; and this action is usually either an action of trespass *vi et armis*, or an action of trespass on the case; the former being brought to recover damages for wrongs done with direct violence, the latter to recover damages for wrongs not done with direct violence, or if done with direct violence, yet resulting from negligence as distinguished from design (Steph. Plead. 17; Smith's Action at Law, 2). Again, where trespass is done to lands or real property, it is called tres-

TRESPASS—*continued.*

pass *quare clausum fregit*: and to support this action, the plaintiff must have been in the actual possession of the land at the time of the trespass committed. On the other hand, where the trespass is done to goods or personal property, it is called trespass *de bonis asportatis*—an action which, equally with the other, rests upon possession, but the possession in this case may be either actual or constructive; constructive possession being that which ownership or property draws with it by implication or construction of law.

See next title.

TRESPASS ON THE CASE. Is the form of action adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied with direct or immediate force. Thus, if a man, in throwing a log into the highway, strikes a passer by, he may sue in an action of trespass simply so-called, and only in that action for damages for the injury he may have sustained; but if after the log has fallen and rested on the ground, he stumbles over it, and so receives an injury, then "trespass on the case," or, as it is commonly called, an action "on the case," would be his appropriate remedy. It is called an action upon the case, because the original writ by which this action was formerly commenced was not conceived in any fixed form, but was framed and adapted to the nature and circumstances of the case by virtue of the statute *De Consimili Casu* (13 Edw. 1, Statute of Westminster the Second), c. 24. See *Scott v. Shepherd*, 2 Bl. Rep. 892; 1 Smith's L. C. 210; 1 Chit. on Pl. 127, 6th ed.; Com. Dig. tit. "Action upon the Case" (a.)

TRIAL. The mode of determining a question of fact in a Court of Law. Or it may, in other words, be defined to be the formal method of examining and adjudicating upon the matter of fact in dispute between a plaintiff and a defendant in a Court of Law. There are various different species of trials according to the nature of the subject or thing to be tried; these, however, will, in general, be found under their respective titles. A trial at bar, which is a species of trial now seldom resorted to excepting in cases where the matter in dispute is one of great importance and difficulty, is a trial which takes place before all the judges at the bar of the Court in which the action is brought (Steph. Pl. 84). The recent case of *Reg. v. Castro*, otherwise *Tichborne*, or *Orton* (1872-3), was an example of trial at bar.

TRIBUNAUX DE COMMERCE. In French Law are Courts consisting of a

TRIBUNAUX DE COMMERCE—*contd.*

president, judges, and substitutes elected in an assembly of the principal traders. No person under thirty years is eligible as a member of the tribunal, and the president must be forty years of age at the least. The tribunal takes cognizance of all cases arising between merchants, and also of all disagreements arising among partners. The course of procedure is as in civil cases, and with an appeal to the regular Courts.

TRIALS OF JURORS. Persons selected by the Court to examine whether a challenge made to the panel of jurors, or any of them, be just or not. A challenge to the panel is grounded on some probable cause of suspicion, as an acquaintance, or the like, the validity of which is determined by these trials. These, if the first juror be challenged, are two indifferent persons named by the Court; if they find one man indifferent, he shall be sworn, and he with the two trials shall try the next, and when another is found indifferent and sworn, the two trials shall be superseded, and the two first sworn on the jury shall try the rest. Cowel; Smith's Action at Law, 146.

See also titles CHALLENGE; JURORS.

TRUTHING: See title TITHING.

TROVER (from the Fr. *trouver*, to find). Is that form of action adapted to try a disputed question of property in goods or chattels. It is called trover, because it is founded upon the supposition (which, however, is in general a mere fiction), that the defendant found the goods in question; and the declaration, after stating such a finding, proceeds to allege that the defendant converted them to his own use (such conversion being the true gist of the action); and then he claims damages for the injury which he has sustained by such wrongful conversion.

In form, the action is a fiction; in substance, it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought, in many cases, where in truth the defendant has got the possession lawfully. It is an action of tort, and the whole tort consists in the wrongful conversion. Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: First, property in the plaintiff; and, secondly, a wrongful conversion by the defendant (see *per* Lord Mansfield in *Cooper v. Chitty*, 1 Burr. 20; 1 Smith's L. C. 230). Moreover, the property necessary to support the action must be one which draws with it a right to

TROVER—*continued.*

the immediate possession also of the thing converted (*Gordon v. Harper*, 7 T. R. 9); consequently, if the thing is in pledge to another, the pledgor, although owner, cannot bring the action. But the pledgee, as having what is called a *special property* in the thing, may bring the action; and generally any bailee of the goods may do so on the like ground.

TRUSTS. Uses having existed previously to the Statute of Uses (27 Hen. 8, c. 10), as confidences which the Court of Chancery upheld and enforced, these early confidences were the earliest form of trusts; but after that statute, these uses having in consequence thereof become transmuted into legal estates, the jurisdiction of Equity over trusts promised to cease, or at any rate, to become unnecessary, when the decision in *Tyrell's Case* (4 & 5 Phil. & M.), whereby the Courts at Westminster refused to recognise any second use upon a first use, i.e., a use upon a use, revived or restored to the Courts in Lincoln's Inn, and even increased, their former jurisdiction over trusts.

In regulating the qualities and incidents of trust estates, Equity followed the Law in its leading principles, construing for example, words of limitation in the like manner as the same were construed at Law, and generally (although with some exceptions hereinafter mentioned), adopting the rules of Law with little or no variation. Thus, in fact, in every estate, there came to exist, by possibility at least, and in general in actual fact as well, two estates of equal quality and duration, existing side by side, and like parallel lines of equal length running beside each other, the one estate being called the equitable estate and the other the legal estate. And like parallel lines, the two estates in their own nature never meet, although just as the two parallel lines being laid upon the top of each other would coincide and grow into one line only, so the two estates being by force, *ab extra* themselves, brought together do also coincide and grow into one estate only, a union which is called the union of the equitable with the legal estate in fee.

Two statutes are all-important in their bearing upon trusts, the first of the two being the Statute of Uses already mentioned, and the other of them the Statute of Frauds (29 Car. 2, c. 3); and in distinguishing these two statutes, it is essential to note,—(1.) That the Statute of Uses, on the one hand, extends to freehold hereditaments only, and neither to leaseholds nor to copyholds; and, *a fortiori*, not to pure personal estate; and, (2.) That the Statute of Frauds, on the other hand, extends to free-

TRUSTS—continued.

holds, leaseholds, and copyholds indifferently, requiring for the creation of a trust thereof respectively the use of *writing*, but as the latter statute does not extend to pure personal estate, it follows that a trust of pure personal estate may be created without writing, or by word of mouth only. *McFadden v. Jenkins*, 1 Phil. 157.

Trusts are manifold; but are commonly arranged under the following heads:—

- I. Express Trusts,—being trusts which are created in so many fit and appropriate terms, and which are subdivided thus,—
 - (a.) Express Private Trusts,—being trusts affecting individuals only; and
 - (b.) Express Public Trusts,—being trusts affecting public bodies primarily.
- II. Implied Trusts,—being trusts founded on the presumable, although unexpressed, intention of the party who creates them; and
- III. Constructive Trusts,—being trusts which are founded neither on an expressed nor on any presumable intention of the party, but which are raised by *construction* of Equity without any regard to intention, and simply for the purpose of satisfying the demands of justice and good conscience.

The following is a more or less exhaustive list of all the varieties of trusts falling under each of the three principal heads above enumerated, and for a particular description of each such variety, see the subtitle that is descriptive thereof.

The varieties of trusts are:—

I. Express Trusts.

- (1.) Express Private Trusts:
 - (a.) Executed and executory trusts;
 - (b.) Trusts voluntary and for value;
 - (c.) Trusts in favour of creditors;
- (2.) Express Public Trusts, called also Charitable Trusts.

II. Implied Trusts.

- (a.) Trusts resulting from a purchase in the name of a stranger;
- (b.) Trusts resulting from an incomplete disposition of the equitable estate; including
- (c.) Trusts of the undisposed of surplus of personal estate for the next of kin, or of real estate for the heir-at-law;
- (d.) Trusts under conversions that fail;
- (e.) Trusts in cases of joint tenancies, whether for purchasers, or for mortgagors.

TRUSTS—continued.

III. Constructive Trusts.

- (a.) Vendor's lien, also vendee's lien, in respect of purchase-money either unpaid or prematurely paid;
- (b.) Renewal of leases by trustee in his own name;
- (c.) Permanent improvements to an estate which were unavoidable;
- (d.) Heir of mortgagor in respect of mortgage loan for next of kin of mortgagor.

There are certain requisites for the creation of a trust, other than and in addition to the statutory requisite of writing above mentioned, where writing is required, these requisites being *three* in number, and familiarly called the *Three Certainties in Trusts*. These three certainties are,—

- (1.) Certainty in the *words* creating the trust;
- (2.) Certainty in the *subject* of the trust, i.e., in the trust property;
- (3.) Certainty in the *object* of the trust, i.e., in the beneficiary.

(See *Knight v. Knight*, 3 Beav. 172; 11 Cl. & F. 513). And failing any one or more of these three certainties, the trust which was intended inevitably fails. But it being clear that some trust was intended, the trustee is not, in such cases, entitled or permitted to take or keep the property for his own benefit (*Briggs v. Penny*, 3 Mac. & G. 546), if there are any other persons entitled (whether as devisees or legatees of the residue, or as heirs, or next of kin of the testator or intestate), to have it made over to them according to its quality; and if there are no such other persons as last mentioned, then the Crown takes the personal estate as *bona vacantia* (*Taylor v. Haygarth*, 14 Sim. 8); but the trustee keeps the real estate for his own benefit, his tenure thereof excluding eachest. *Burgess v. Wheate*, 1 Eden, 177.

Executed and Executory Trusts.—An executed trust is one which the person creating it has fully and finally declared, whence also it is called a Complete Trust; an executory trust is one which the person creating it has not fully or finally declared, but has given merely an outline of it by way of direction to the conveyancer, whence also it is called sometimes an Incomplete and sometimes a Directory Trust. The Court of Chancery deals very differently with executory trusts to what it does with executed ones.

Thus (1.) That Court follows the Law (*æquitas sequitur legem*) with regard to executed trusts, e.g., the rule in *Shelley's Case* applies to these without any exception; whereas with regard to executory

TRUSTS—continued.

trusts the Court takes the following distinction, viz. :—

(a.) If the executory trust occurs in marriage articles (*Trevor v. Trevor* 1 P. Wms. 622), or in a will manifestly pointing at marriage (*Papillon v. Voice*, 2 P. Wms. 571), the Court refuses to follow the rule in *Shelley's Case* as to their construction, as by so doing it would give to the intended husband full power of defeating the prospective issue of the intended marriage of the provision presumably intended to have been made in their favour; but

(b.) If the executory trust occurs in a will, and that will does not manifestly point at marriage, the Court follows the rule in *Shelley's Case*, and gives to the ancestor an estate in fee simple or in fee tail without reference to his issue, there being no presumption in this case of any intention to provide for such issue (*Sweetapple v. Bindon*, 2 Vern. 536; *Papillon v. Voice*, *supra*); and

(2.) The Court of Chancery is ready, and is even compellable, in all cases of an executed trust to give full effect to the same, saving all prior equitable rights, and that even in favour of volunteers, but the Court refuses and is not compellable in any case of an executory trust being in favour of a volunteer to give any effect whatever to the same, which consequently falls to the ground, although the Court will in many cases of executory trusts being in favour of purchasers for value and such like, give effect thereto, saving all prior equitable rights. See title TRUSTS VOLUNTARY AND FOR VALUE.

A trust may be an executed trust in either of two ways, either

(1.) By declaration of trust, which is a simple and informal mode of creating it, requiring, however, writing (although not a deed) in the case of land (whether freehold, copyhold, or leasehold), but not even requiring any writing in the case of pure personal estate. The Court of Chancery is bound to enforce a trust that is completely created in this simple manner (*Ex parte Pye*, *Ex parte Dubost*, 18 Ves. 140). If the person should be both legal and equitable owner of the property of which he declares the trust, he declares himself the trustee thereof; if, on the other hand, he is the equitable owner only, he directs his own trustee (who is the legal owner) to hold the property upon the trusts which he then and there specifies in the direction; and such latter direction, although it has not (nor any notice of it) been sent to the trustee, and although the trustee refuses his assent to it, is binding and effectual against the party giving it; but notice to the trustee is necessary to give the new

TRUSTS—continued.

trustee a right *in rem* over the trust property which shall protect him in it against third persons claiming without notice thereof (*Bill v. Curleton*, 2 My. & K. 503);

Or, again, a trust may be an executed trust,—

(2.) By assignment or conveyance of the trust property, according as it is personal or real estate, to a trustee, accompanied with a limitation or declaration of the trusts thereof; but many difficulties have arisen with reference to this second mode of creating a trust, which manifestly is a mere technical or formal mode of doing so. The sources of the difficulty have been two, and (apparently) only two, that is to say,—

(a.) The circumstance that, at Law, and also in Equity, there can be no assignment, strictly so called, of personal estate, and no conveyance, strictly so called, of real estate otherwise than by deed; and neither the statutes (e.g., the 30 & 31 Vict. c. 144, as to Policies of Life Assurance; the 31 & 32 Vict. c. 86, as to Policies of Marine Assurance), which prescribe a simple statutory form of assignment or conveyance, nor the Judicature Act, 1873, ss. 25, 26, itself have altered the former law of the Courts in this respect; and

(b.) The further circumstance, that until the Judicature Act, 1873, s. 25, the Courts of Law and the Courts of Equity respectively proceeded upon different principles with regard to the assignability of choses in action (see that title), which constitute by far the larger part of the personal property which is made the subject of a trust.

From these two sources of difficulty combined, it has been held in numerous cases that trusts attempted to be created in the more formal manner, i.e., by assignment or conveyance accompanied with an express declaration of the trusts, are executory only and not executed in the following cases,—

(a.) When the assignment was attempted to be made by the use of the words, "I do hereby assign," &c., indorsed on the back of the receipt given for a subscription paid upon a call in respect of shares in a company, the indorsement not having been executed and delivered as a deed. *Antrobus v. Smith*, 12 Ves. 39;

(b.) Where the assignment was attempted by the like form of words also indorsed on the back of a bond, the indorsement not having been executed and delivered as a deed, although the bond itself was delivered (*Edwards v. Jones*, 1 My. & C. 226); and even

(c.) When collateral formalities, being such as went to affect the efficacy of the

TRUSTS—continued.

deed for the purpose of assignment had been neglected, although the assignment was by deed duly executed and delivered, and therefore valid by the general law. *Searle v. Law*, 15 Sim. 95.

On the other hand, it has been held in still more numerous cases, that trusts attempted to be created in the more formal manner are executed and not executory merely in the following cases:—

(a.) Where the property was assignable at Law, and the person assuming to assign it used for that purpose a deed duly executed and delivered, there being no neglect of collateral formalities interfering with the validity of the deed for the purpose of assignment; and even

(b.) Where the property was not assignable at Law, but the person assuming to assign it used for that purpose a deed duly executed and delivered, there being no neglect of collateral formalities interfering with the validity of the deed for the purpose of assignment. *Fortescue v. Barnutt*, 3 My. & K. 36; *Kekewich v. Manning*, 1 De G. M. & G. 176.

And a comparison of the two cases just cited shews, that for the validity of such an assignment in the creation of a trust it makes no difference whether the assignor is both legal and equitable owner, or equitable owner only, provided that if equitable owner only, it is not within his power at the time of the assignment to clothe himself with the legal ownership as well, before making the assignment (*Gilbert v. Overton*, 2 H. & M. 110); but the assignment is executory only, if it is within his power to do so at the time of the assignment and he neglects to do it before assigning (*Bridge v. Bridge*, 16 Beav. 322); but of course only if he knows it. *Gilbert v. Overton*, 2 H. & M. 110.

Trusts Voluntary and for Value.—Voluntary Trusts are trusts in favour of a volunteer, *i.e.*, of a person as to whom the trust is a pure bounty or gift, for which he pays or gives nothing as the price thereof; on the other hand, trusts for value are trusts in favour of purchasers, mortgagees, or others, whom the Courts of Equity regard as valuable claimants.

(A.) If a voluntary trust is *executed*, *i.e.*, complete (see title EXECUTED TRUSTS), the Court is ready and is compellable to enforce it; but if a voluntary trust is *executory*, *i.e.*, incomplete, the Court refuses and is not compellable to enforce it, and accordingly it falls to the ground (*Jefferys v. Jefferys*, Cr. & Ph. 138). This rule is without any exception, excepting (but to a very limited extent) in the case of powers, and excepting in the case of powers in the nature of trusts; and accordingly, in the

TRUSTS—continued.

case of voluntary trusts, the conflict has in general been confined to the finding of one fact, *viz.*, whether the trust is executed, *i.e.*, complete, or is executory, *i.e.*, incomplete, as to which see the sub-title EXECUTED AND EXECUTORY TRUSTS.

(B.) On the other hand, a trust for value, whether it be executed or executory, is invariably enforced by the Court of Chancery, saving all prior equitable rights.

Voluntary trusts and trusts for value are also distinguished by the Courts of Equity in many other ways; thus

(a.) A voluntary settlement, whether of real or of personal estate, if it be fraudulent within the meaning of the stat. 13 Eliz. c. 5, is void against creditors who were in existence at the date of the settlement, and are thereby hindered in the recovery of their debts (*Spirett v. Willows*, 3 De G. J. & S. 293), or who not having become creditors already at the date of the settlement, have an equity to stand in the position of the creditors who were already such at that date (*Freeman v. Pope*, L. R. 5 Ch. 538); but although being fraudulent it is good and valid against the settlor himself (*Smith v. Garland*, 2 Mer. 123). On the other hand, a settlement for value, whether of lands or goods, if it be not fraudulent within the meaning of the Common Law, *i.e.*, in common sense and reason, is valid against all the world, including the settlor, and also creditors and purchasers, no matter although these latter persons may be hindered or frustrated in the recovery of their debts or purchases; and a very little value, not being colourable, will in general suffice, more especially if it be conjoined with the consideration of blood or natural affection, which the law considers meritorious (*Harrison v. Negus*, 16 Beav. 594); again,

(b.) A voluntary settlement (being, however, of real estate only), if it be fraudulent within the meaning of the statute 27 Eliz. c. 4, is void against purchasers, including mortgagees, who become such subsequently to its date (and, *à fortiori*, if they were so already previously to its date); but such a settlement is good against subsequent judgment creditors (*Beavan v. Earl of Oxford*, 6 De G. M. & G. 507), and as against the settlor himself and volunteers claiming under him that are subsequent in date, and even (it has been held) against a *bonâ fide* purchaser for value from such latter volunteers (*Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035). On the other hand, a voluntary settlement, being of personal estate, can in no case be fraudulent within the meaning of, not being in fact comprised within, the stat. 27 Eliz. c. 4, and

TRUSTS—continued.

therefore is good against all the world, so far, at any rate, as that statute is concerned (*Jones v. Croucher*, 1 S. & S. 315); but it is clear it may be fraudulent either within the meaning of the 13 Eliz. c. 5, or within the meaning and intention of the Common Law, in either of which cases it would have no validity excepting as against the settlor himself, volunteers claiming under him, and, *semble*, purchasers under such volunteers (*see* title **FRAUDULENT GIFTS**). On the other hand, a settlement for value, whether of lands or goods, not being fraudulent within the meaning of the Common Law, is good against all the world. Lastly,

(c.) Under the Bankruptcy Act, 1869, s. 91, settlements that are post-nuptial are *ipso facto* void on the ground of fraud, if the settlor becomes bankrupt within two years from their date, and are also void upon the like event happening within ten years until proof of solvency at their date, the property settled being the bankrupt's in his own right, and not what he takes in right of his wife.

Trusts for Creditors.—Deeds of trust in favour of creditors, although they contain no express power of revocation, are (unlike other deeds, and unlike even voluntary deeds) revocable by the settlor, as a general rule (*Garrard v. Lord Lauderdale*, 3 Sim. 1), they being arrangements for the debtor's own convenience merely, and not investing his creditors with the character of *cestuis que trust*. Made one day, they may be unmade the next, upon a happier thought. Nevertheless, such deeds become irrevocable in certain cases, being principally two, namely,—

(a.) Where the creditors, or one or more of them, are parties to the deed, and execute it, it becomes irrevocable as to the executing creditor or creditors (*Mackinnon v. Stewart*, 1 Sim. (N.S.) 88); and

(b.) Where the deed is communicated to non-executing creditors, and they, or one or more of them, after such communication, relying on the deed, have altered their positions or position relatively to the debtor, *e.g.*, by abandoning some compulsory proceeding which they had commenced against him for the recovery of their debts (*Acton v. Woodgate*, 2 My. & K. 495; *Field v. Lord Donoughmore*, 1 Dru. & War. 227); but mere communication, not followed by such an alteration of position, does not make the deed irrevocable. *Biron v. Mount*, 24 Beav. 649.

Trusts in Joint Tenancies.—Equity acting upon the maxim that equality is equity, although it is bound to recognise the joint tenancies which the rules of law create, nevertheless seizes upon the

TRUSTS—continued.

very slightest grounds of difference, distinction, or inequality for neutralising in effect the incident of survivorship which attaches to joint tenancies, on the ground that such incident is unequal or inequitable as between the tenants. And accordingly, in the case of **MORTGAGES**, although the mortgagees are as a general (and, indeed, almost invariable) rule made joint tenants at law, and the legal estate accordingly survives to the survivor wholly, yet Equity, as well (a) where the amounts advanced by the respective mortgagees are equal, as also (b) where they are unequal, breaks through the rule of Law to this extent, that it secures to the deceased his due proportion of the mortgage debt, and for that purpose, and because it finds the legal estate already vested wholly in the survivor, declares the latter a trustee (1) for the deceased, to the extent of his proportion, and (2) for himself, as to the residue of the money lent. And again, in the case of **PURCHASES**, although the purchasers are made joint tenants, and necessarily, therefore, are to remain so at Law, so that the legal estate survives to the survivor wholly, yet Equity (c) where the amounts advanced by the respective purchasers are unequal, breaks through the rule of Law to this extent, that it secures to the deceased his due proportion of the purchased land, and for that purpose, and because it finds the legal estate already vested wholly in the survivor, declares the latter a trustee (1) for the deceased to the extent of his proportion, and (2) for himself, as to the residue of the purchased land; but (d) where the amounts advanced by the respective purchasers are equal, Equity has no ground for breaking through the rule of Law, and in that case therefore (being one case only out of four) permits the incident of survivorship at Law to have its way in Equity as well. *See* also **SURVIVORSHIPS**.

Charitable Trusts.—These are trusts in favour of hospitals, the people, and such like. As compared with trusts in favour of individuals, trusts in favour of charities are treated by the Court of Chancery as being,—

- (1.) In some respects on a level with individuals;
- (2.) In other respects with more favour than individuals; and
- (3.) In one respect with less favour than individuals.

Thus (1.) They are treated on a level with individuals in the two following respects:—

(a.) The Court of Chancery will supply the want of a trustee or executor in the case of a gift to a charity, just as it will

TRUSTS—continued.

do (at any rate, since the Trustee Act, 1850, and Trustee Extension Act, 1852) in the case of a gift to an individual (*Mills v. Farmer*, 1 Mer. 55);

(b.) The Court of Chancery, equally with the Courts of Law, requires charitable bodies to bring their actions and suits within the times limited for the same by the Statute of Limitations (3 & 4 Will. 4, c. 27); *Att.-Gen. v. Christ's Hospital* (3 My. & K. 344), being no longer law. Again,

(2.) Charities are treated with more favour than individuals in the two following respects:—

(a.) Where a general intention to give to charities is evidenced by the particular intention which is expressed in the instrument of gift, and that particular intention fails from any cause, the Court of Chancery will find some other particular mode of making the gift effectual for a charity (*Moggridge v. Thackwell*, 7 Ves. 69, see title CY-PRAES); whereas in the case of individuals the trust in such a case would be void for want of one of the three requisite CERTAINTIES.

(b.) The Court of Chancery will also supply in favour of a charity defects in conveyances, not being defects which any statute has rendered fatal to the gift (*Sayer v. Sayer*, 7 Hare, 377); but no such assistance would be rendered to individuals (see sub-title VOLUNTARY TRUSTS); lastly,

(3.) Charities are less favoured than individuals in this respect, that the Court will not marshal assets in favour of charities, although it will do so in the case of individuals. *Williams v. Kershaw*, 1 Keen, 274, n.

Vendor's Lien.—Where the vendor conveys the estate sold before receiving the whole or some part of the purchase-money thereof, he has a lien, *i.e.*, hold, on the estate for the unpaid purchase-money or unpaid part thereof; and conversely, the purchaser or vendee also has a lien on the estate contracted to be sold for the purchase-money or the part thereof where he has already paid, or prematurely paid, the same, by way of deposit or otherwise, and the contract for any reason not imputable to himself afterwards goes off. *Mackreth v. Symmons*, 15 Ves. 329; *Wythes v. Lee*, 3 Drew. 396.

Either the vendor or the vendee may, however, by his own negligence, or by being party to a fraud, prejudice or lose the priority of his lien over subsequent charges or claims (*Rice v. Rice*, 2 Drew. 73). Moreover, he will be taken to have abandoned his lien in the following cases:—

(1.) Where a bond, bill, promissory note, or covenant, is taken expressly in lieu of, or in substitution for, the unpaid purchase-

TRUSTS—continued.

money (*Buckland v. Pocknell*, 13 Sim. 406; *Parrott v. Sweetland*, 3 My. & K. 655);

(2.) Where any security (not of a personal nature), *e.g.*, either a long annuity (*Nairn v. Prowse*, 6 Ves. 752), or a mortgage either of the same (*Bond v. Kent*, 2 Vern. 281), or of a distinct estate (*Cowell v. Simpson*, 16 Ves. 278), is taken for the unpaid part of the purchase-money.

But the lien will remain where any security which is of a personal nature is taken generally, that is to say, is not taken in express substitution for the purchase-money. *Collins v. Collins*, 31 Beav. 346.

The lien avails against the following parties:—

- (1.) The purchaser or vendor, as the case may be;
- (2.) The heirs of either;
- (3.) Volunteers claiming under either;
- (4.) *Mala fide* purchasers for value under either;
- (5.) The trustee in bankruptcy of either; and
- (6.) *Bona fide* purchasers for value under either, not having the legal estate.

All these distinctions depend upon the simple principle, that the lien being a real right, and therefore higher in quality than a personal right, is not lost or merged in the subordinate right, unless the parties have so expressly agreed.

Trustee's Renewal of Lease.—In the case of a renewable lease which is held in trust by A. for B., upon the time for renewal coming round, if A. renews the lease in his own name, and expressly or impliedly for his own benefit, he is nevertheless held by the Court of Chancery to be a trustee for B. of the renewed lease, and it does not matter that the landlord, for reasons of his own, expressly and persistently refused to grant a renewal to B., or in favour of B. (*Keech v. Sandford*, 1 W. & T. L. C. 39), the trustee being the only person in the world who, in such a case, is incapacitated from taking a renewal in his own name. The like stringent rule applies in the case of one co-partner taking a renewal behind the backs of his co-partners (*Featherstonhaugh v. Fenwick*, 17 Ves. 311); also, of an executor *de son tort* doing the like (*Mulvany v. Dillon*, 1 Ball. & B. 409); also, of a tenant for life doing the like (*Roue v. Chichester*, Amb. 211); also of a joint tenant doing the like (*Palmer v. Young*, 1 Vern. 276); also of a mortgagee (*Rushworth's Case*, Freem. 12), or mortgagor (*Smith v. Chichester*, 1 C. & L. 486; *Scabourne v. Powell*, 2 Vern. 11) doing the like.

Permanent Improvements by Tenant.—

TRUSTS—continued.

Where a tenant for life (but not also where a tenant in tail, or a tenant in fee simple) expends money in finishing the unfinished buildings of the testator or settlor, or in doing other works of the like permanent and beneficial nature, *being also works which are necessary to be done, and which will not wait*, then he is entitled to be repaid a proportion of those expenses, as for unexhausted improvements (*Hilbert v. Cooke*, 1 S. & S. 552; *Dent v. Dent*, 30 Beav. 363). But, excepting in the two cases before mentioned, he is not entitled to any such repayment, however beneficial or meritorious the result may be to the estate generally (*Dent v. Dent*, *supra*); and in all cases, therefore, other than the two before mentioned, it is advisable for him, on the one hand, if the improvements are of an agricultural nature, to borrow money for the purpose under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), or, on the other hand, if the improvements are of a residential nature, to borrow the necessary money under the Limited Owners' Residences Act, 1870 (33 & 34 Vict. c. 56).

Heir a Trustee.—When a person has a mortgage in fee which he has not foreclosed, and dies intestate, the legal estate in the mortgaged property descends to his heir or real representative; but the administrators of the deceased, or his personal representatives, are entitled to the beneficial ownership of the moneys due on the mortgage, and to the security for the same; and, accordingly, the Court of Chancery, finding the legal estate in the heir, declares him a trustee for them to the extent of the moneys secured by the mortgage. *Thornborough v. Baker*, 1 Ch. Ca. 28.

See also next title.

TRUSTS RESULTING. Either,

- (1.) From purchase in name of stranger; or
- (2.) From incomplete disposition of equitable estate; or
- (3.) From the failure of equitable conversions.

(1.) In the case of purchasers, whether of land or of goods, the conveyance or assignment of which is taken or made in the name of a party other than the purchaser himself or person who pays the money, the GENERAL RULE is, that the grantee or assignee in whom the legal estate is so vested holds the property in trust for the purchaser and for the benefit of the purchaser only. This is merely one form of the old rule that a feoffee under consideration was a trustee for the feoffor. But the EXCEPTIONS to this rule are more important than the rule itself, and are

TRUSTS RESULTING—continued.

generally summed up under the head *Advancement*, which title see.

(2.) In the case of a conveyance or assignment, or devise or bequest of lands or of personal estate to A. in fee simple, or other estate, upon trust for certain estates and purposes which do not exhaust the entire fee simple or other estate, it is a general rule and without any exceptions, that all that part of the estate which is not exhausted by the trusts declared results, in the case of a settlement to the settlor, and in the case of a will to the heir or real representatives of the testator if the estate is in realty, and to the executors or personal representatives of the testator if the estate is in personality (*Parnell v. Hingston*, 3 Sm. & Giff. 344). But in applying this rule it is necessary to distinguish conveyances or assignments, or devises or bequests upon trust, from conveyances or assignments, or devises or bequests, which are merely *subject to or charged with* certain limited beneficial interests, the grantee or devisee, assignee or legatee, in the latter case taking the entire residue for his own benefit after satisfying the charge. *King v. Denison*, 1 Ves. & B. 272.

(3.) When money is directed to be turned into land, or land is directed to be turned into money, for certain purposes or upon certain trusts, the property is in Equity considered as already, from the date of the direction taking effect, converted into that into which it is directed to be converted (see title CONVERSION); in other words, the money as being notionally land, and the land as being notionally money. But this equitable conversion is subject to the following limitation, that is to say, the direction extends no further than the trusts or purposes for the sake of which it is given, or such of the same trusts or purposes as are capable of taking effect, and as also take effect, require it to extend; and accordingly the margin or surplus of the property over and above what is required for those trusts or purposes results in the case of a deed to the settlor, and in the case of a will to the next of kin, so far as the direction for conversion concerned personal estate, and to the heir-at-law so far as it concerned real estate.

TURBAN: See title PRE-AUDIENCE.

TURBARY (from *turba*, an old Latin word for *turf*). Turbary, or common of turbary, is the right or liberty of digging turf upon another man's ground. *Kitchin*, 94

See also title COMMON.

TURNPIKE ROADS. These are roads on which parties have by law a right to erect gates and bars, for the purpose of

TURNPIKE ROADS—continued.

taking toll, and of refusing the permission to pass along them to all persons who refuse to pay (*Northam Bridge and Roads Co. v. London and Southampton Ry. Co.*, 6 M. & W. 428.) So in the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 50, a turnpike road means a road which is repaired by tolls payable by passengers for the use of the road (*Reg. v. East and West India Docks and Birmingham Junction Ry. Co.*, 2 El. & Bl. 466.) The law of turnpike roads is partly regulated by statute, the Act 8 Geo. 4, c. 126, being the General Turnpike Act, and having been amended by subsequent Acts. A turnpike-road may become a highway (see that title), 30 & 31 Vict. c. 121. A *mandamus* does not lie to compel the repair of a turnpike-road (*Reg. v. Oxford and Witney Roads (Trustees)*, 12 A. & E. 427); but the proper proceeding is to summon in the first instance the treasurer, surveyor, or other officer of the turnpike-road trust before the justices at special sessions, under the stat. 5 & 6 Will. 4, c. 50, s. 94.

TUTEUR OFFICIEUX. In French Law, a person over fifty years of age may be appointed a tutor of this sort to a child over fifteen years of age, with the consent of the parents of such child, or in their default the *conseil de famille*. The duties which such a tutor becomes subject to are analogous to those in English Law of a person who puts himself *in loco parentis* to any one.

TUTEUR SUBROGÉ. In French Law, in the case of an infant under guardianship, a second guardian is appointed to him, the duties of the latter (who is called the *subrogé tuteur*) only arising where the interests of the infant and his principal guardian are in conflict. Code Nap. 420.

U.

UMPirage. When matters in dispute are submitted to two or more arbitrators and they do not agree in their decision, it is usual for another person to be called in as umpire, to whose sole judgment it is then referred; the word "umpirage," in reference to an umpire, is the same as the word "award" in reference to arbitrators; but award is commonly applied to the decision of the umpire also.

See title **ARBITRATION** and **AWARD**.

UNDER-CHAMBERLAIN OF THE EX-CHEQUER. An officer in the Exchequer who cleared the tallies written by the clerk of the tallies, and read the same, that the clerk of the poll and the comptroller might see that their entries were

UNDER-CHAMBERLAIN OF THE EX-CHEQUER—continued.

true. He also made searches for all records in the treasury, and had the custody of Domesday Book. There were two officers of this name, but their office is now abolished. Cowel.

UNDERLEASE. Is a lease granted by one who himself is only a lessee of the premises which he underlets. Thus, if A. grants a lease of land to B. for twenty-one years, and B. afterwards grants a lease of the same land to C. for fourteen years, here C. would be termed the underlessee, and the lease, by virtue of which C. held the land, an underlease. In this respect an underlease differs from an assignment, which is a transfer of the entire term, or residue thereof. The underlessee has no privity with the original lessor, and is liable for rent to his immediate lessor only. But it is different with the assignee.

UNIFORMITY OF PROCESS ACT. Is the title commonly given to the statute 2 Will. 4, c. 39, by which a more simple and uniform course of proceeding for the commencement of personal actions was established. Until the passing of that statute, the practice or forms of proceeding in the three superior Courts at Westminster differed greatly from each other. The improvements introduced by this statute were founded on the report of the Common Law Commissioners, a body of distinguished men in the legal profession, appointed to consider the effects of the then existing system, with a view to its correction. In some important particulars, however, the enactments of the stat. 2 Will. 4, c. 39, have been again altered by the more recent Act of 1 & 2 Vict. c. 110; as, for instance, under the Act of Will. 4 an action might be commenced either by a writ of summons or by a *capias*, whereas under the subsequent statute, which is still in force, it can only be commenced by a writ of summons. More sweeping enactments have been made by the C. L. P. Act, 1852.

See title **PROCEDURE**.

UNITY OF POSSESSION. Joint possession of two rights by several titles. As if I take a lease of land from a person at a certain rent, and afterwards I buy the fee-simple of such land; by this I acquire unity of possession, by which the lease is extinguished; because I, who before occupied the premises only in consideration of rent, do by the purchase of the fee simple become lord of the same. Cowel.

UNLAWFUL ASSEMBLY: See title **RIOT**.

UPPER BENCH, COURT OF. The Court of Queen's Bench was so called during the

UPPER BENCH, COURT OF—*contd.*

interval between 1649 and 1660, the period of the Commonwealth.

USAGE. This word as used in English Law differs from custom and prescription, in that no man may claim a rent, common, or other inheritance by usage, though he may by prescription. Moreover, a usage is local in all cases, and must be proved; whereas a custom is frequently general, and as such is noticed without proof. Usage, in French Law is the *usus* of Roman Law, and corresponds very nearly to the tenancy at will or on sufferance of English Law.

USANCE. The time which, by the usage of different countries between which bills of exchange are drawn, is appointed for their payment. This is a calendar month, as from the 20th of May to the 20th of June, and what is termed a double usance consists of two such months. Chitty on Bills.

USER. Is the act of using or enjoying any profit or benefit to be taken from or upon the land, or any easement to be enjoyed upon or over any land or water. And in law the effect of such user (if continued for a period sufficiently long, and under circumstances which indicate the exercise of a right on the part of the person so using the land), is to establish a prescriptive claim ever after to enjoy the same profit or easement. Co. Litt. 115 a; and see title **PRESCRIPTION**.

USES. The word "*use*," in its original legal application, denoted simply the benefit or beneficial enjoyment of land. The invention of uses is commonly attributed to the ecclesiastics; and they having been the early lawyers, that origin is probable. The system of uses was attended with numerous advantages to the true owners of the land,—the use not being subject to escheat or to forfeiture, and being devisable by will, and transferable without livery of seisin; but like other systems it was made the channel of numerous abuses, lands being conveyed by means of it to persons and in ways forbidden by the words—or, at all events, by the policy—of the Statute Law. Thus, by means of the use, lands came largely into mortmain to spiritual corporations, contrary to the Statutes of Mortmain (7 Edw. 1; 15 Ric. 2, c. 5); and, ultimately, after some Acts of a more imperfect character, the Statute of Uses (27 Hen. 8, c. 10) was passed, which in effect enacted that the *use* should be the *land*, and that where the *use* was there the land or legal estate should be and should be deemed to be. In consequence of this statute the word "*use*" departed with its original signification,

USES—*continued.*

and became equivalent to seisin or legal estate.

By the decision in *Tyrrell's Case* (4 & 5 Ph. & M.) the Courts of Law held that the Statute of Uses intended the first use only, and that as soon as it had executed that use and made it the legal estate, it was exhausted. But the Courts of Chancery, while adopting the rule of Law so far, went further, and gave the benefit or beneficial enjoyment, as before, to the person intended to benefit, calling the first use the legal estate man, or trustee merely, and the proper beneficiary, being the second or last use, the *cestui que trust* and true owner in Equity.

By the joint operation of the Statute of Uses and the decision in *Tyrrell's Case* two lines of estate have become well established in Law,—namely, (1) the legal estate in the *trustee*, which retains all, or nearly all, its ancient incidents; and (2) the equitable estate in the *cestui que trust*, which has received incidents analogous to those of the legal estate, upon the maxim, *Equity follows the Law*.

By the means of these uses new facilities have been furnished for the conveyance of property.

See title **CONVEYANCES**.

USES, CHARITABLE: See titles **CHARITIES**; **CHARITABLE USES** and **TRUSTS**.

USES, SUPERSTITIOUS: See title **SUPERSTITIOUS USES**.

USHER (from the Fr. *huissier*, a door-keeper of a Court). A subordinate officer in the Courts of Law. The chief usher in the Court of King's Bench used to hold his office by letters patent under the great seal for two lives, and to execute it by three deputies. But see now 15 & 16 Vict. c. 73, ss. 16-21, which enacts that the ushers of the Superior Courts shall be appointed by the Chief Justices and Chief Baron respectively, and prescribes their salaries and tenure of office. There are also ushers in the Courts of Chancery, appointed in like manner by the judges of those Courts.

USHER OF THE BLACK ROD. The Gentleman Usher of the Black Rod is an officer of the House of Lords appointed by letters patent from the Crown. His duties are, by himself or deputy, to desire the attendance of the Commons in the House of Peers when the royal assent is given to bills either by the Queen in person or by commission, to execute orders for the commitment of persons guilty of breach of privilege, and also to assist in the introduction of peers when they take the oaths and their seats.

USUCAPIO. A term of Roman Law used to denote a mode of acquisition by the civil—i.e., old strict, law. It is, however, sometimes used as interchangeable with *longi temporis possessio*. It corresponds very nearly to our term prescription or limitation, which by the stats. 3 & 4 Will. 4, c. 27 (as to corporeal hereditaments), and 2 & 3 Will. 4, c. 71 (as to incorporeal hereditaments) confers a positive (although merely possessory) title on the holder. But the prescription of Roman Law differed from that of the English Law, not only in its times (which are of less importance), but also in this great and peculiar feature, that no *malá fide* possessor (i.e., person in possession knowingly of the property of another) could by however long a period acquire title by possession merely, the two never-failing requisites not only to *usucapio*, but also to *longi temporis possessio*, being *justa causa* (i.e., title) and *bona fides* (i.e., ignorance). The term *usucapio* is sometimes, but erroneously, written *usu-capio*. In Roman Law, re-acquisition by *usucapio* was called *USURECEPTIO*.

USUFRUCT (*usufructus*). An usufruct has been defined to be that real right in another's property which entitles a party to reap all the fruits of the thing, and in general to have the whole use and enjoyment of it, as far as is practicable, without injury to its substance (*salva rerum substantiá*). He who is so entitled to enjoy the fruits of another's property is termed the usufructuary, in contradistinction to the actual proprietor of the thing (Just. Inst. ii. 4). The usufructuary was invariably entitled for life, and for no less period; he, therefore, corresponds to our tenant for life.

USUFRUIT. This is, in French Law, the usufruct of English and Roman Law.

USURA MARITIMA: See title *FœNUS NAUTICUM*.

USURIOUS CONTRACT: See title *USURY*.

USURPATION OF ADVOWSON. An injury which consists in the absolute ouster or dispossession of the patron, and which happens when a stranger who has no right presents a clerk, and the latter is thereupon admitted and instituted.

USURPATION OF FRANCHISES, or OFFICES. The unjustly claiming or usurping any office, franchise, or liberty.

USURY (*usura*.) An unlawful contract on the loan of money to receive the same again with exorbitant increase; that is, not only to receive the principal sum again, but also an exorbitant interest by way of compensation for the use of such principal sum. All restrictions upon the rate of

USURY—continued.

interest were, however, abolished by stat. 17 & 18 Vict. c. 90.

UTTER, TO. In law signifies to put in circulation, to offer or tender to another man, and is used in reference to forged instruments or counterfeit coin. Thus, by stat. 11 Geo. 4 & 1 Will. 4, c. 66, it is enacted that the forging or uttering of any Exchequer bill, Bank of England note, bill of exchange, deed, transfer of stock, &c., &c., knowing it to be forged, and with the intent to defraud, shall be felony; and by 2 Will. 4, c. 34, s. 7, it is provided that "if any person shall tender, utter, or put off any false or counterfeit gold or silver coin, knowing the same to be counterfeit, he shall be guilty of a misdemeanor, and be imprisoned for any term not exceeding a year. See *Rees v. Jones*, 9 C. & P. 761.

UTTER BAR (or Outer Bar) is the bar at which those barristers, usually junior men, practise who have not yet been raised to the dignity of queen's counsel. These junior barristers are said to plead without the bar, while those of the higher rank are admitted to seats within the bar, and address the Court or a jury from a place reserved for them and divided off by a bar.

See title *UTTER BARRISTERS*.

UTTER BARRISTERS. Barristers-at-law, in general, who plead without the bar. They are called utter barristers, i.e., pleaders without the bar, to distinguish them from the benchers, or those who have been readers, and are sometimes admitted to plead within the bar, the same as king's and queen's counsel are. Cowell.

V.

VACATION. The interval between each term is termed the vacation, that is, between the end of one term and the beginning of the next. These intervals of a cessation of business are retained under the Judicature Act, 1873, but are differently reckoned, the distinction of terms having been abolished by that Act, in name at least.

VADIUM MORTUUM (*dead pledge*): See next title.

VADIUM VIVUM (*a living pledge*). When a man borrows a sum of money of another (suppose £200), and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed; in this case the land or pledge is said to be living; it works off, i.e., repays and survives, the debt, and immediately on the discharge of that reverts back to the borrower. It is called a *vicum*

VADICUM VIVUM—*continued*

valued, and may be subject to a lien in favor of a mortgagee, and it will be done so if itself were sold, and the debt, but the mortgagee must needs have notice of the nature of the land and its value. In the case of both these species of mortgages the mortgagee receives the rents and profits with an amount in which respect they both differ from a mortgage properly so called.

See title MORTGAGE.

VAGABONDS and VAGRANTS. For the offences which bring persons under either of these denominations, see the Stat. 5 Geo. 4, c. 83; 1 & 2 Vict. c. 36; and 31 & 32 Vict. c. 52.

VAGRANTS: See title VAGABONDS AND VAGRANTS.

VALOR MARIAGII (*value of marriage*). The meaning of this may be collected from the following passage:—"During the prevalence of the feudal tenures the guardian was at liberty to exercise over his infant ward the right of marriage (*maritagium*, as contradistinguished from matrimony), which in its feudal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For while the infant was in ward the guardian had the power of tendering him or her a suitable match, without disparagement or inequality; which if the infants refused, they forfeited the value of the marriage (*valorem maritagitii*) to their guardian; that is, so much as a jury would assess, or any one would *bonâ fide* give to the guardian for such an alliance; and if the infants married themselves without the guardian's consent they forfeited double the like value, *duplicem valorem maritagitii*." Litt. 110.

VALUABLE CONSIDERATION. The distinction between a good and a valuable consideration is, that the former consists of considerations of blood, or of natural love and affection; as when a man grants an estate to a near relation from motives of generosity, prudence, and natural duty; and the latter consists of such a consideration as money, marriage which is to follow, or the like, which the law esteems an equivalent given for the grant. The conveyance by bargain and sale requires to be for valuable consideration, as distinguished from that by a covenant to stand seised, which requires to be for blood or natural affection (see title CONVEYANCES). In the statutes of Elizabeth against fraud (13 Eliz. c. 5, and 27 Eliz. c. 4), a *good* consideration means a valuable one.

VARIANCES. It is a general rule that

VARIANCES—*continued*

a party must recover *secundum allegata et probata*; but in matters impertinent or immaterial to the issue, or merely formal or superfluous, a variation between the pleading and the evidence is unimportant, more especially since the powers of amendment conferred by the C. L. P. Act, 1852.

Variances are of the following kinds:—

(1.) Variance in the *parties* to a contract,—being either the omission of a plaintiff who ought to be joined (*Grain v. Robertson*, 2 T. R. 282), or the misjoinder of a plaintiff or defendant, not also the non-joinder of a defendant (1 Wms. Saund. 231-4), which can only be pleaded in abatement. These cases of variance may be amended *ad nisi prius* under the C. L. P. Act, 1852, ss. 35-38. (See title AMENDMENT.)

(2.) Variance in the *consideration* of a contract,—being the omission of any part of the consideration. The variance in such a case is fatal (*Dashwood v. Peart*, Manning's Index, 308), unless the omitted part is not material. *Clarke v. Gray*, 6 East, 568.

(3.) Variance in the *promise* in a contract,—being the omission of any part of the promise. The variance in such a case may or may not be fatal; e.g., the omission of an exception contained in the promise would be fatal (*Latham v. Rutley*, 2 R. & C. 20), but the omission of an addition or of a defence would not be so. *Miles v. Sheward*, 8 East, 7; *Holham v. E. I. Co.* 1 T. R. 640.

VASSAL. Originally signified a feudal tenant or grantee of land. It seems doubtful what the exact relationship was that subsisted between lord and vassal; some writers are of opinion that they stood to each other in the relation of landlord and tenant, and to a certain extent were the companions of each other; while others affirm that the vassal was little better than the slave or bondman of his lord. The state or condition of a vassal is termed vassalage. 2 Chitty's Bl. 52, n. (6).

VENTIDIONE EXPONAS. A judicial writ directed to the sheriff commanding him to sell goods which he has taken into his hands by virtue of a former writ (but to which writ he had returned that he had taken the goods, but that they remained in his hands for want of buyers), in order to satisfy judgment against the defendant. 1 Arch. Pract. 678; Reg. Jud. 33.

VENDORS AND PURCHASERS. The vendor of lands undertakes to make a good title thereto, and should he fail to do so, the purchaser is discharged from his contract, and recovers damages (*Fleurean v.*

VENDORS AND PURCHASERS—contd.

Thornhill, 2 W. Bl. 1078; *Hopkins v. Grazebrook*, 6 B. & C. 31). The duties of such a vendor are now regulated in all material points by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, and incidentally also by the other sections of that Act, relative to Abstracts of Title, Sales by Trustees, Protection of Legal Estate, and Tacking. On the other hand, the vendor of personal property (not being chattels real), comes under no such liability, unless he expressly chooses to warrant the title of the thing sold, the general maxim of the Common Law in the case of sales of personal property being *caveat emptor* (*Morley v. Attenborough*, 8 Ex. 500). Usually, upon a purchase, the risk of the thing purchased attaches to the purchaser, as from the moment that the sale is complete (*Tarling v. Baxter*, Tud. L. Q. Mer. Law, 596). See title SALE with reference to sales of personal property, and the following titles with reference to sales of real property (including leaseholds or chattels real), viz., ABSTRACT OF TITLE; CONVEYANCE; FRAUD; and for VENDOR'S LIEN—see title TRUSTS.

VENIRE FACIAS. A judicial writ which used to be directed to the sheriff of the county in which a cause was going to be tried, commanding him to cause a jury of twelve men to come from the body of his county to try the issue between the litigating parties. The writ has been abolished by the C. L. P. Act, 1852, s. 104.

See title JURY.

VENIRE DE NOVO. A fresh or new venire, which the Court grants when there has been some impropriety or irregularity in returning the jury, or where the verdict is so imperfect or ambiguous that no judgment can be given on it (2 Arch. Pract. 1549; *Smith's Action at Law*, 173). In all cases where this trial *de novo* is grantable, the Court is bound to grant it as of right, and without being shackled with any restrictive or other condition.

VENTER (*the belly*). Is used in law as designating the maternal parentage of children. Thus, where in ordinary phraseology, we should say that A. was B.'s child by his first wife, he would be described in law as "by the first venter;" similarly, we may say, "A. died seised, leaving two infant daughters by different venters." *Doe d. Barnett v. Keen*, 7 T. R. 886.

VENUE. The county in which an action is intended to be tried, and from the body of which the jurors are accordingly to be summoned, is so called. This county, or *venue*, as it is termed, when fixed upon and determined by the plaintiff, is always inserted in the margin of his de-

VENUE—continued.

claration, which is termed "laying the *venue*" in such a county; and the action itself is then said to be "laid" or brought "within that county." By the Judicature Act, 1873 (Sched. Rules of Proc. 28), there is to be no local *venue* for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he is in his statement of claim to name the county or place in which he proposes that the action shall be tried; and the action thereupon shall, unless the judge otherwise orders, be tried in the county or place so named.

VERDEROR (*verdurier*). An officer of the king's forest, who is sworn to maintain and keep the assizes of the forest, and to view, receive, and enrol the attachments and presentments of all manner of trespasses of vert and venison in the forest. *Manwood*, c. 6, s. 5.

See also title VERT.

VERDICT. A verdict is the unanimous judgment or opinion of the jury on the point or issue submitted to them. A verdict is either general or special. It is said to be general when it is delivered in general words with the issue; as if the issue be on a plea of not guilty, then a general verdict would be that the defendant is guilty, or is not guilty, as the case may be. It is said to be special when the jury instead of finding the negative or affirmative of the issue, as in the case of a general verdict, declare that all the facts of the case as disclosed upon the evidence before them, are in their opinion proved, or, in other words, find the special facts of the case, but that they are ignorant in point of law on which side they ought, upon these facts, to find the issue; that if upon the whole matter the Court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the Court are of an opposite opinion, then *vice versa*. This special verdict is then, together with the whole proceedings on the trial, entered on record; and the question of law arising on the facts found is argued before the Court in banc, and decided by that Court as in case of demurrer. A verdict is called a *privy* verdict when the judge has left or adjourned the Court; and the jury being agreed, in order to be delivered from their confinement, obtain leave to give their verdict *privily* to the judge out of Court, which *privy* verdict, however, is of no force, unless afterwards affirmed by a public verdict given openly in Court. *Boote's Suit at Law*, 273; *Steph. Pl.* 100; *Sm. Act.* at *Law*, 159.

VERGE (*virga*, rod). The Court of the Marshalsea had jurisdiction within the verge of the Court, which, in this respect, extended for twelve miles round the king's place of residence. The word "verge" is also used to signify a rod or stick by which one is admitted tenant to a copyhold estate, by holding it in one's hand and swearing fealty to the lord of the manor. Old Nat. Brov. 17.

VERIFICATION. Is a certain formula with which all pleadings containing new affirmative matter must conclude. It is in itself an averment that the party pleading is ready to establish the truth of what he has set forth. It is either common or special. The common verification runs in the following form: "And this the plaintiff [or defendant] is ready to verify." A special verification is used only when the matter pleaded is to be tried by record, or by some other method than the ordinary mode of trial by jury; and in the case of a trial by the record would be in the following form: "And this the plaintiff [or defendant] is ready to verify by the said record." When new matter is introduced into a pleading, it must always conclude with a verification. Stoph. Pl. 479; Finch's Law, 359.

See also title *ET HOC PARATUS EST VERIFICARE*.

VERT (*Fr. green*). In general signifies everything that grows and bears green leaf within the forest. There are two sorts of vort in every forest, viz., over vert and neather vert. Over vert, sometimes also called *hault-boys*, is all manner of great wood, as well such as bear fruit as do not. Old ash and holly trees are accounted over vert. Neather vert, sometimes also called *south-boys*, comprises all kinds of underwood, bushes, thorns, gorse, and such like. Whether fern and heath are included under the term "neather vert," seems doubtful. Manwood argues that they are not; Fleetwood and Heskett maintain the contrary opinion. The vort which grows in the king's demesne woods is termed special vert. From this word "vert" is derived the word "verderor." See Harewood, c. 6, ss. 2, 4, 5.

VESTED INTEREST. An interest, property, or estate, whether in possession or not, which is not subject to any condition precedent and unperformed. The interest may be either a present and immediate interest, or it may be a future but unconditioned, and therefore transmissible, interest, an interest which is contingent not being transmissible at all. Thus a vested remainder is that description of remainder by the creation of which a present interest passes to the party; and though the re-

VESTED INTEREST—continued.

mainder itself, *ex vi termini*, can only be enjoyed *in futuro*, yet a present, immediate, and disposable interest, as remainderman, is at once conveyed, and therefore the remainder is called a vested remainder. A vested interest is not necessarily an unconditional interest; on the contrary, it is frequently qualified by some condition, being, however, a condition which does not extend to delay the vesting of the interest.

VESTED LEGACY. A legacy is said to be vested when the words of the testator making the bequest convey a transmissible interest, whether present or future, to the legatee in the legacy. Thus a legacy to one, to be paid when he attains the age of twenty-one years, is a vested legacy, because it is given unconditionally and absolutely, and therefore vests an immediate interest in the legatee, of which the enjoyment only is deferred or postponed; and if such legatee die before that age, his representatives shall receive it out of the testator's personal estate at the time that it would have become payable had the legatee himself lived. But if the legacy were given when or if the legatee attain a certain age, it would not be vested, i.e., transmissible, until that age; and if the legatee were to die before that age, the legacy would fail to take effect, and his representatives could make no claim to it. For in this case the bequest is a kind of conditional one, depending upon the happening of a certain event, viz., the legatee's attaining the specified age. See *Foraston's Case*, *Paulett v. Paulett*, *Stapleton v. Cheales*, and *Hansom v. Graham*, Tud. L. C. Conv.

VIAGÈRE, RENTE. In French Law is a rent-charge or annuity payable for the life of the annuitant.

VICAR (*vicarius*). The priest or parson of every parish is termed a rector, unless the predial tithes be appropriated, and then he is called a vicar, that is, has the part of a vice-rector. The distinction, therefore, between a parson and vicar is this, that the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, and to whom he is in effect perpetual curate, with a standing salary. Cowel; Wms. Real Prop. 330, 8th ed.

VICAR-GENERAL. Is an ecclesiastical officer in each diocese, appointed by, and acting under, the authority of the bishop. He formerly was only occasionally constituted during the bishop's absence from his

VICAR-GENERAL—*continued.*

diocese; but now he is the perpetual representative of the bishop in certain matters, such as the granting of licences, &c., where there is nothing of contention or litigation between the parties. He appears to have no criminal jurisdiction, and therefore cannot inquire, in the place of the bishop, into such offences as quarrelling, brawling, or smiting, &c. Roger's Ecc. Law, 143, 144; Gibs. Intro. 23; *Thorpe v. Mansel*, 1 Hag. Con. 4, *in nota*.

VICARIAL TITHES. Those tithes to which vicars are entitled, and which are generally called *privy* or *small tithes*.

See title **TITHES**.

VICINAGE (from the Fr. *voisinage*, neighbourhood). Common because of vicinage or neighbourhood, signifies the right exercised by the inhabitants of two townships which lie contiguous to each other, of intercommuning one with another; the beasts of the one straying mutually into the other's fields without any molestation from either.

See title **COMMON**.

VIDELICET, or SCILICET. The words to wit, or, that is to say, so frequently used in pleading, are technically called the *videlicet*, or *scilicet*; and when any fact alleged in pleading is preceded by, or accompanied with, these words, such fact is, in the language of the law, said to be laid under a *videlicet*. The use of the *videlicet*, or *scilicet*, is to point out, particularise, or render more specific that which has been previously stated in general language only; also to explain that which is doubtful or obscure. It has been called by Lord Hobart a "hand-maiden to another clause." Where the *scilicet* is contrary to the preceding general statement it may be rejected (*Dakin's Case*, 2 Wms. Saund. 678). But a *videlicet*, or *scilicet*, which is not so contrary, and which is not mere surplusage, cannot be rejected as immaterial, but may be traversed like any other averment. See notes to *Dakin's Case*, *supra*.

VIEW. In real actions a defendant might have demanded a view, that is, a sight of the thing, in order to ascertain its identity and other circumstances. As if a real action were brought against a tenant, and such tenant did not exactly know what land it was that the demandant asked, then he might have prayed the view, which was that he might see the land which the demandant claimed (F. N. B. 178). And now generally under the C. L. P. Act, 1854, s. 58, an inspection of real or personal property may be had or made whenever it would be conducive to the right decision of a case.

VIEW OF FRANKPLEDGE. The office which the sheriff in his County Court, or the bailiff in his hundred, performed in looking to the king's peace, and seeing that every man was of some pledge.

See title **FRANKPLEDGE**.

VIEW OF AN INQUEST. Is a view or inspection taken by a jury, summoned upon an inquisition or inquest, of the place or property to which the inquisition or inquiry refers.

See title **VIEW**.

VI LAICÂ REMOVENDÂ. A writ that lies where two persons contend for a church, and one of them enters into it with a great number of laymen, and keeps out the other *vi et armis*; then he who is so kept out shall have this writ directed to the sheriff, by virtue of which he shall remove such lay force. But the sheriff must not remove the incumbent out of the church, whether he is rightfully there or not, but only the force, or laymen, that accompanied him. *Les Termes de la Ley*; Cunningham.

VILL. Seems to bear the same signification in law as a town or tithing, and each of them is said to have had originally a church, and celebration of divine service, sacraments, and burials; though this seems to be rather an ecclesiastical than a civil distinction, and hence it is that the word "vill" has by some writers been described as a parish or a manor. It appears to have some different significations, but its more ordinary meaning was that of a town; and the Statute of Exeter (14 Edw. 1) so uses it in making frequent mention of villas, demi-villas, and hamlets. Sir Henry Spelman conjectures entire villas to have consisted of ten freemen or frankpledges (hence tithing), and demi-vills of five. Co. Litt. 115 b.; stat. 14 Edw. 1; Spel. Gloss. 274; 1 Inst. 115; Bract. lib. 4, c. 31.

VILLAINS, or VILLEINS. Were a sort of people under the Saxon government in a condition of downright servitude, who were used and employed in the most servile works, and are even said to have belonged to the lord of the soil, like the cattle or stock upon it. They seem to have been those who held what is termed the folk-land, from which they were removeable at the lord's pleasure. These villeins, belonging principally to lords of manors, were either villeins regardant, that is, annexed to the manor or land, or else they were villeins in gross, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another, either apart from, or with, the land. The tenure by which villeins held

VILLAINS, OR VILLEINS—continued.

their land, and their condition in general, was termed "villennage." Cowel; *Les Termes de la Ley*.

See title **VILLENAGE**.

VILLANIS REGIS SUBTRACTIS REDUCENDIS.

A writ that lay for the restoring the king's bondmen who had been carried away by others out of his manors to which they belonged. Reg. Orig. 87; Cowel.

VILLANOUS JUDGMENT.

Such a judgment as threw the reproach of villany and shame on those against whom it was given, and by which they were discredited and disabled as jurors or witnesses; forfeited their goods, and chattels, and lands, for life; had their lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison (1 Hawk. P. C. 193; Lamb. Eiren.). A judgment in attainr against unjust jurors had these effects, and was, therefore, a villanous judgment.

See titles **ATTAINT**; **JURORS**, **IMMUNITY** OF.

VILLENAGE. This was the species of slavery or serfdom in which villeins lived; for the varieties of whom see title **VILLAINS**. It was a state of society recognised by the law, but which, from various circumstances favouring liberty, has entirely disappeared out of England; the latest cases on the subject being *Crouch's Case* (9 & 10 Eliz.), and *Pigg v. Caley* (15 Jac. 1); and according to the genius of the English constitution, as explained by Mr. Hargreaves in his argument in *Somerset's Case*, no new slavery can be introduced into England. So jealous, indeed, was the law of any such new form of it, that it was at one time doubted whether a contract of service, intended to last during the life of the servant, was legal; a question decided in favour of the legality of it in *Wallis v. Day* (2 M. & W. 273 (1837)). A slave who is for one moment introduced by his master on English territory is, therefore, absolutely free (*Somerset's Case*, 20 St. Tr. 1), nor may his owner carry him by force out of the country (Magna Charta and Habeas Corpus Act); although if the slave of his own accord return with his master to the slave country, his slavery at once re-attaches. *The Slave Grace*, 2 Hag. Adm. 91.

VINCULO MATRIMONII, DIVORCE À.

A divorce from the bond of matrimony.

See title **DIVORCE**.

VIOLENT PRESUMPTION: See title **PRESUMPTION**.

VIRTUTE CUJUS (by reason whereof).**VIRTUTE CUJUS—continued.**

That part of the declaration in an action which, after setting forth the various grievances complained of, proceeds to point out the injurious results which have flowed therefrom, is frequently technically spoken of as the "*virtute cujus*," from the words employed therein, which are, "by reason whereof." Thus, in an action for diverting water from the plaintiff's mill, the declaration, after stating the plaintiff's right to the water, and particularising the injurious act complained of, proceeds to point out the injury which the plaintiff has sustained in consequence, in the following manner: "and the plaintiff, by reason of the premises," had been prevented from working his said mill in so beneficial a manner as he heretofore has, and otherwise could and would have done, &c. &c. See Doctr. Pl. 351: 11 Rep. 106; Steph. Pl. 221, 5th edit.

VISITATION. The office performed by the bishop of every diocese once in every three years, or by the archdeacon once in every year, of visiting the churches and their rectors. These visitations were instituted for the purpose of correcting any abuses or irregularities that might arise therein; and the persons who perform such visits are termed the visitors (Cowel). Most, if not all, of the colleges at Oxford and Cambridge have their visitors.

VIVÂ VOCE. As applied to examinations of witnesses and generally, this phrase is equivalent to oral; it is used in contradistinction to evidence on affidavits.

VOIDANCE: See **AVOIDANCE**.

VOIR DIRE (see him speak). This phrase is applied to denote that preliminary examination which the judge makes of one presented as a witness, where the witness's competency is objected to. If the witness is a child of very tender years, the judge will examine him on the *voir dire*, to test his knowledge of the sacredness of an oath. If the result of such preliminary examination supports the objection to incompetency, then the witness will be rejected; but in the general case the judge inclines to allow the competency, leaving the objection to go to the credibility merely. The examination on the *voir dire* may be made at any stage of the trial, whenever the occasion for it arises.

VOLUMUS. The first word of a clause in the king's writs of protection and letters patent. Cowel.

See titles **PROTECTION**; **PATENT**.

VOLUNTARY CURTESY. A voluntary act of kindness. An act of kindness performed by one man towards another, of

VOLUNTARY CURTESY—*continued.*

the free will and inclination of the doer, without any previous request or promise of reward made or offered by him who is the object of the curtesy. From such a voluntary act of kindness the law implies no promise on the part of him who is benefited by such act that he will make any remuneration or return for the same; for if it were otherwise, one man might impose a legal obligation upon another against his will. If, however, the curtesy or act of kindness was performed at the instance or request of the party benefited, then the law implies a promise on the part of the latter to make a remuneration or return for such act. Hence the meaning of the phrases, that a "voluntary curtesy will not support an assumpsit," but that "a curtesy moved by a previous request will." See *Lampleigh v. Braithwaite*, Hob. 105; 1 Smith's Leading Cases, 139; 3 Bos. & P. 250, *in notis*; *Durnford v. Messiter*, 5 M. & S. 446.

See title **CONTRACTS**.

VOLUNTARY JURISDICTION.

Those Courts are said to have a voluntary jurisdiction which are merely concerned in doing or settling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licences, faculties, and other remnants of the papal jurisdiction), but do not concern themselves with administering redress for any injury.

VOLUNTARY OATHS are such as persons take in extra-judicial matters, and not regularly in a Court of Justice, or before an officer invested with authority to take the same.

VOLUNTEERS. For the military use of this word, see title **ARMY**; and consult stat. 26 & 27 Vict. c. 65. In the language of Equity, it denotes a person becoming entitled to property *ex causâ lucrativâ* (i.e., without giving any payment or other consideration for the same), and in that sense is opposed to a purchaser for value.

See also title **TRUSTS**.

VOTES AND PROCEEDINGS. In the Houses of Parliament the clerks at the table make brief entries of all that is actually done; and these minutes, which are printed from day to day for the use of members, are called the "Votes and Proceedings of Parliament." The votes and proceedings of the House of Commons are published by the Speaker's authority, and sold to the public as well as distributed among the members themselves; but those of the House of Lords are not published nor sold, although they can be obtained as a favour by persons desiring them. From

VOTES AND PROCEEDINGS—*contd.*

these "votes and proceedings" the journals of the House are subsequently prepared, by making the entries at greater length; but in neither is any notice taken of the speeches of a debate.

W.

WADSET. A Scotch term for mortgage.

WAGER OF BATTLE. This was a mode of trial, as to the meaning of which, see title **BATTLE**. It was abolished in writs of right by the 59 Geo. 3, c. 46; and as the same statute abolished also appeals of murder, of treason, and of felony, this mode of trial may be considered to have been then abolished altogether.

WAGER OF LAW This was a species of "decisory oath" taken by the defendant to an action on a simple contract, and in some few other actions, not being on specialties. The defendant swore in Court, in the presence of eleven compurgators, that he owed the plaintiff nothing, or that he did not detain the plaintiff's goods, and the eleven swore that they believed his oath to be true. This mode of trial was only admissible in the absence of all evidence; the Court would rather discharge the defendant on his oath than charge him on the plaintiff's uncorroborated oath. Wager of law was abolished by 3 & 4 Will. 4, c. 42, s. 13.

WAGERING. By the stat. 8 & 9 Vict. b. 109, all contracts or agreements, whether by parol or in writing, by way of gaming or wagering are declared null and void; and no action or suit is maintainable for recovering any sum of money or other valuable article alleged to be won upon any wager, or which has been deposited in the hands of any person to abide the event of the wager. And by the stat. 16 & 17 Vict. c. 119 (extended to Scotland, and generally rendered more rigorous, by the Betting Act, 1874, 37 & 38 Vict. c. 15) a penalty is imposed upon persons being the occupiers or owners of betting-houses, and who receive money to abide the event of any wager; or who advertise advice on races, subject to certain exceptions mentioned in the Act. Those statutes have produced an alteration in the Common Law; for by the Common Law an action might have been maintained on a wager, strictly so called, if it was not against the interests or the feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy. *Thackoorseydass v. Dhondmull*, 4 Moo. Ind. App. 339.

WAGES. The payments made to servants and workmen are so called.

See titles **LABOURER**; **SERVANT**.

WAIFS. If a felon, in his endeavours to escape pursuit, waived, *i.e.*, threw away, the goods stolen, then the king's officers (or the lord's bailiff) might have seized the goods to the king's (or the lord's) use, and keep them as a punishment upon the true owner, if he did not prosecute the thief within a year and a day, or at least give evidence against him leading to his conviction; but such owner, if he was a foreign merchant, *i.e.*, a stranger to our laws, was not so punished. Waifs are to be distinguished from *bona fugitiva*, which are the goods of the felon himself, which he abandons in his flight from justice.

See title **FUGITIVE'S GOODS**.

WAIN, WAINAGE. A cart or wagon, with its equipments. The law exempted the labourer's wainage from being taken for debt (see **MAGNA CHARTA**); and many similar exceptions, suited to modern society, are afforded by our law to the honest but unfortunate debtor. See *Simpson v. Hartopp* (1 Sm. L. C. 385), as to what things are privileged from distress; and see also the provisions of the Bankruptcy Act, 1869, as to the clothes and bedding of the bankrupt, and of his wife and family.

WAIVER. This word is commonly used to denote the declining to take advantage of an irregularity in legal proceedings or of a forfeiture incurred through breach of covenants in a lease. A gift of goods may be waived by a disagreement to accept; and then it is no gift. See *Hill v. Wilson* (L. R. 8 Ch. 888), for a modern application of this doctrine. So, also, a plaintiff may commonly sue in contract, waiving the tort. But the doctrine of waiver is chiefly valuable in connection with covenants in leases; and in this use of it waiver is commonly said to be of two sorts, namely, (1.) Implied waiver, and (2.) Actual waiver. With reference to the first kind of waiver, a receipt of rent by a landlord after notice of a breach of covenant committed by his tenant prior to the rent becoming due, was an implied waiver of his right of entry for that particular breach (Co. Litt. 211, s. 6); and with reference to the second kind of waiver, if a landlord, in express terms, waived his right of re-entry on the ground of the breach for that once, he was considered in law to have waived it also for all subsequent breaches of the same covenant; but by the stat. 22 & 23 Vict. c. 35, s. 6, the effect of an actual waiver is now reduced in this respect to that of an implied, which is the most ordinary kind of waiver.

WALES. It appears that England and Wales were originally but one country; and that even after Wales had princes of its own, the kings of England exercised a superiority over them. King Edward I, in the twenty-eighth year of his reign, annexed the marches of Wales perpetually to the Crown of England; and the annexation was completed by the 27 Hen. 8, c. 26. By the subsequent stat. 34 & 35 Hen. 8, c. 26, Wales was divided into twelve counties, a president and council appointed for the Principality, and two justices were to be assigned to hold a session twice every year. By the 1 Wm. & M. st. 1, c. 27, the Court of the President and Council was abolished, and the process of the Courts at Westminster was partially extended to Wales. And now by 20 Geo. 2, c. 42, s. 3, in an Act of Parliament, the word "England" is made to include Wales and Berwick-on-Tweed as well as England proper; and by 11 Geo. 4 & 1 Will. 4, c. 70, the process of the Courts at Westminster was made the exclusive process in Wales, and the circuits of North and South Wales were established.

WAPENTAKE. A local division of the country; the name is in use north of the Trent to denote a hundred. The derivation of the name is said to be from *weapon* and *take*, and indicates that the division was originally of a military character.

WAR: See titles **ARMY AND NAVY**; **MILITIA**; **VOLUNTEERS**.

WARD. A division in the city of London committed to the special ward, *i.e.*, guardianship, of an alderman. The name also denotes a prison or division thereof. All infants are likewise denominated *wards*, as to whom see title **INFANTS**.

WARDEN. A keeper, *e.g.*, the Warden of the Cinque Ports, the Warden of the Stannaries, and the Warden of the Fleet Prison.

WARD-MOTE. The Court of the division of the City of London which is called a "*ward*."

WARDS, COURT OF. This was a Court established by Henry VIII, and to which he afterwards added the office of liveries (32 Hen. 8, c. 46). The Court was abolished by 12 Car. 2, c. 24, along with the military tenures.

WAREHOUSING SYSTEM. This system, called also the Bonded Warehouse, or Bonding System, is that by which goods imported are allowed to be deposited in public warehouses at a reasonable rent without payment of the duties on importation if they are re-exported; or if they are afterwards withdrawn for home consump-

WAREHOUSING SYSTEM—continued.

tion, without payment of such duties until they are so withdrawn. The principal statutes regulative of the matter are, the stat. 43 Geo. 3, c. 132, whereby the system was first established, the consolidation stat. 3 & 4 Will. 4, c. 57, and the recent stats. 23 & 24 Vict. c. 36, and 32 & 33 Vict. c. 103, called the Customs and Excise Warehousing Act, 1869.

WARRANT. A precept under hand and seal to an officer to take up an offender, to be dealt with according to due course of law.

See title **CONSTABLE**.

WARRANT OF ATTORNEY: See title **POWER OF ATTORNEY**.

WARRANTIA CHARTA. A writ which lay for a man who was enfeoffed of lands with warranty, and who being afterwards sued or implicated in assize or other actions in which he could not vouch to warranty, was permitted by means of this writ to compel the feoffor, or his heirs, to warrant the land to him; and if that writ were obtained by the feoffee pending the first writ against him, then in case the land were recovered from him, he should recover as much lands in value against the warrantor (F. N. B. 134; *Les Termes de la Ley*, 372, 588). The writ was abolished by 3 & 4 Will. 4, c. 27, s. 36.

WARRANTY. This word applies both to real and to personal property.

I. As applied to real property—it is a covenant, i.e., a promise by deed, by the grantor for himself and his heirs to warrant, i.e., secure, the grantee and his heirs in the thing granted against all the world. The benefit of such a warranty appeared when it was attempted to evict the grantee of the lands, who thereupon either vouched his warrantor, or obtained judgment in a writ of *warrantia charta* against him to defend his title, or else to recompense him with other lands of equal value.

Warranty was either implied or express. By the old law, every feudal grant, by the word "*dedi*," involved or implied a warranty; but in other modes of grant of a more recent origin an express clause of warranty was required.

A warranty bound not only the warrantor himself but also his heirs, and it made no difference whether the warranty was *lineal* or *collateral*, that is to say, whether the heirs had or not derived, or might or not by possibility have derived, title from or through the warrantor. But the heir in either case was in theory bound only if he had received other sufficient lands or assets by descent from the warrantor, although both in lineal and in collateral warranty

WARRANTY—continued.

he was in effect bound whether he had received such lands or not, inasmuch as the assets he should have recovered upon upsetting the warranty of his ancestor were regarded as assets by descent from his ancestor, and as such would be liable to make good his warranty. This was an evident abuse of a proper principle; and the abuse was corrected,—as to the warranties of tenants by the curtesy, by the stat. 6 Edw. 1, c. 3; and as to the warranties of tenants in dower, by the stat. 11 Hen. 7, s. 20; and as to the warranties of tenants for life generally, by the stat. 4 & 5 Anne, c. 16; and last of all, as to the warranties of tenants in tail, by the stat. 3 & 4 Will. 4, c. 74, s. 14.

II. As applied to personal property—a warranty may also be either express or implied. The better opinion is, that there is no implied warranty of title upon the sale of personal chattels, but there may, of course, be an express warranty of title. And neither is there any implied warranty of the goodness or soundness of the articles sold, but there may of course be an express warranty to that effect; and there is an implied warranty that the goods sold are fairly merchantable, or will fairly answer the purpose for which they are known to be bought, e.g., that provisions are wholesome. The custom of trade may also give rise to an implied warranty of goodness, e.g., where goods are bought and sold by sample (2 East, 314). A general warranty does not extend to obvious defects, e.g., to the want of the tail in a horse that is warranted perfect. Dig. 18, 1, 43, s. 1; 1 Salk. 211.

A warranty differs from a misrepresentation (whether fraudulent or innocent) in that a warranty must always be given contemporaneously with and as part of the contract, whereas a misrepresentation proceeds and induces to the contract. And while that is their difference in nature, their difference in consequence or effect is this: that upon breach of warranty (or false warranty), the contract remains binding and damages only are recoverable for the breach; whereas upon a false representation the defrauded party may elect to avoid the contract, and recover the entire price paid.

See title **FRAUD**; and next title.

WARRANTY, BREACH OF. This must be distinguished from misrepresentation. For the warrantor is liable for damages for breach of warranty whether he knew or did not know that the thing sold was imperfect, when as for a misrepresentation he would only be liable if he knew it was false when he made it.

WARRANTY, BREACH OF—*contd.*

The remedy for a breach of warranty differs also from the remedy for a misrepresentation. Thus, on breach of warranty the purchaser is not entitled to return the article and get back his money; at the most he can only obtain damages which will go in part reduction of the price. On the other hand, in case of a misrepresentation the purchaser is entitled to send back the article and have his money returned to him.

A warranty may be either express or implied—

- (1.) Express, where given in so many words at the time of the purchase;
- (2.) Implied, where the purpose for which the article is bought is known to the seller.

WASTE. This word, which is derived from *ravum*, denotes that havoc or devastation which arises from exceeding the right of user. The word is, therefore, applicable only to persons having limited interests or estates in lands, e.g., tenant for life, or *pur autre vie*, tenant in dower, and tenant by the curtesy; and it is inapplicable, as a general rule, to tenants in fee tail or in fee simple.

By the Common Law waste was punishable in the cases only of tenants for life who were such by operation of law, namely, tenant in dower and tenant by the curtesy; but by the Statute of Marlbridge (52 Hen. 3), c. 23, it was made punishable in the cases also of tenants for life, or *pur autre vie*, or for years, who were tenants by the creation of the parties or of the settlor. Furthermore, the Courts of Equity have long interfered to remedy waste in cases in which the Courts of Law were powerless to interfere; and there has grown up accordingly a distinction of waste into *legal* on the one hand, being such as Law can restrain; and *equitable* on the other hand, being such as Equity alone can restrain. However, by the Judicature Act, 1873, this distinction appears to be abolished, in part at least (36 & 37 Vict. c. 66, s. 25, sub-s. 3), if not also in whole (sub-s. 11), as from the 2nd of November, 1875.

While the distinction before mentioned subsisted, the divisions and sub-divisions of waste were the following:—

- (1.) Legal waste, being either
 - (a.) Voluntary waste; or
 - (b.) Permissive waste; and
 - (2.) Equitable waste, which was in all cases voluntary, and so is described as equitable waste only.
- (1 a.) Voluntary legal waste consisted in the following particulars: pulling down houses, pulling down wainscots, doors,

WASTE—*continued.*

windows, furnaces, and other such fixtures, causing timber trees to decay, stubbing up underwood, cutting down fruit-trees in an orchard, cutting down trees which shelter the mansion; also, opening new gravel pits, lime pits, clay pits, &c., or new mines of metal, coal, or the like; also the conversion of old meadow land into arable, or of arable into plantation, or the like; and even ploughing up a rabbit warren (*Angerstein v. Hunt*, 6 Ves. 488), or reclaiming deer in a park. *Ford v. Tynte*, 2 J. & H. 153.

(1 b.) Permissive legal waste consisted in suffering houses to get into decay; but the Courts have ceased to give any remedy or assistance in such cases (*Warren v. Rudall*, 1 J. & H. 1, 13), notwithstanding the same are generally considered to have been comprised in the Statute of Gloucester, 6 Edw. 1, c. 5.

(2.) Equitable waste consisted in "malicious, extravagant, or humorous" acts of destruction on the part of a tenant who was not impeachable for waste at law, e.g., where a tenant for life without impeachment of waste, pulls down or dismantles the mansion-house (*Vane v. Lord Barnard*, 2 Vern. 738), or pulls down farm-houses (*Aston v. Aston*, 1 Ves. 265), or totally destroys a plantation (*Id.*), or fells ornamental timber (*Rolt v. Lord Somerville*, 2 Eq. Ca. Abr. 759); or, again, where a tenant in tail after possibility of issue extinct commits the like acts of waste (*Att.-Gen. v. Duke of Marlborough*, 3 Madd. 538); or, again, where a devisee in fee simple with an executory devise over on his death without leaving issue, or on any other event, does the like acts of waste (*Turner v. Wright*, 1 Johns. 740); or, again, where a tenant in possession under a disputed title does the like acts of waste. *Earl Talbot v. Hope Scott*, 4 K. & J. 96.

Procedure in cases of waste: The legal remedy for waste used to be either a writ of waste (which, however, was abolished by 3 & 4 Will. 4, c. 27, s. 36), or an action on the case; and at the present day the legal remedy is an action on the case, in which action an injunction may also be obtained. But the equitable remedy, which was and is by bill, was and is more generally resorted to; and Equity, which until 1854, had exclusive jurisdiction by injunction used to interfere, and also still interferes, in the three following groups of cases:—

- (1.) Where a remainderman for life intervenes in the order of the limitations between the tenant who commits the waste and the owner of the inheritance in remainder or reversion (*Tracy v. Tracy*, 1 Vern. 23);

WASTE—*continued.*

(2.) Where the tenant for life who commits the waste is in collusion with the remainderman in fee to the prejudice of an intervening contingent remainderman (*Garth v. Cotton*, 1 Ves. 516); and

(3.) Where the waste is *equitable* as opposed to *legal*.

And see titles **EQUITABLE WASTE**; **LEGAL WASTE**.

WATCH. Watching is properly for the apprehending of rogues in the night, as warding is for the day; for default of watch or ward the township may be punished.

See also title **POLICE**.

WATER-BAILIFF. An officer in port towns for the searching of ships. In the City of London he has the supervising of fish brought thither, the gathering of the toll arising from the Thames, and the arrest of men for debt, or other personal or criminal matters, on that river.

WATER AND WATERCOURSE: See title **EASEMENTS**.

WATERMEN. These are eight overseers elected annually by the Lord Mayor and Court of Aldermen of the City of London to exercise supervision over all wherry-men, watermen, and lightermen upon the River Thames between Gravesend and Windsor. Their duties were latterly regulated by the Consolidation Act (7 & 8 Geo. 4, c. 75); but the matter is now to some extent regulated by the recent stat. 27 & 28 Vict. c. 113.

WAYS. Ways are of four principal varieties, namely—

- (1.) *Iter*, i.e., a footway;
- (2.) *Actus*, i.e., a horse and footway, called also a packway;
- (3.) *Via*, i.e., a cartway (including foot and horseway); and
- (4.) A driftway (probably included in Roman Law under the term *actus* but being excluded therefrom in English Law), i.e., a way for driving cattle.

Ways are either public or private, the former being open to all the king's subjects, the latter being open to the inhabitants of a particular parish, village, or house only; a public way is also commonly called a highway.

It is commonly said that every highway is the king's; but this means that the king and his subjects have at all times the right to pass and repass only at their pleasure; for the freehold and all the profits thereof belong to the lord of the soil (2 Inst. 705), being in general the adjoining owner, who therefore may bring trespass for digging in the highway. 1 Burr. 143.

WAYS—*continued.*

* A public way need not be a thoroughfare; nor is a thoroughfare of necessity a public way.

The dedication of a public way is readily presumed from user as such, e.g., from eight or six years' user. But a highway may also exist by virtue of an express grant. It most commonly exists in virtue of some Act of Parliament.

With reference to the repair of highways, the whole parish is of common right bound to repair all the roads of the parish, and the whole county all the roads of the county. And this liability continues, although some particular person or persons may be liable in the first instance to make the repairs. Such particular person or persons may be bound to repair a highway either by reason of prescription or by reason of inclosure. The prescriptive duty to repair is often called the liability to repair *ratione tenuræ*. The liability by reason of inclosure arises when the owner of unenclosed lands adjoining the highway encloses them, and thereby prevents the public going on the lands enclosed when the road is bad.

Anything whereby the public are incommoded in their use of the highway is a nuisance to it, e.g., the foulness of the adjoining ditches, the overhanging of boughs, &c., whence the adjoining owner is bound to scour his ditches, and also to lop his trees adjoining the highway. Every unauthorized obstruction of a highway is an indictable offence.

Any one may justify in pulling down or abating a common nuisance, e.g., in demolishing a gate erected in a common highway.

The whole law of highways is now principally regulated by statute; see 5 & 6 Will. 4, c. 50; 25 & 26 Vict. c. 61, and 27 & 28 Vict. c. 101.

With reference to private ways, see title **EASEMENTS**.

WEAR. A great dam made across a river, accommodated for the taking of fish, or to convey a stream to a mill.

WEIGHTS. There are two sorts of weight in use, viz., troy weight and avoirdupois, the former containing 12 oz. and the latter 16 oz. to the pound.

See title **MEASURES**.

WERGILD. This was the price of homicide, or other atrocious personal offence, paid partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person. In the Anglo-Saxon laws the amount of compensation varied with the degree or rank of the party slain.

WHIPPING. This is a punishment which may or may not accompany sentences of imprisonment in most cases; as to females, it was abolished by 1 Geo. 4, c. 51.

WIDOW: See titles **DOWER** and **NEXT OF KIN**.

The king's widow was she who, after her husband's death being the king's tenant *in capite*, could not marry again without the king's consent.

WILL, ESTATE AT: See titles **ESTATES**; **TENANCIES**.

WILLS. For the growth of the power of alienation by devise, see **ALIENATION**. The whole law of wills has been digested in a single Act, viz, the New Wills Act (7 Will. 4 & 1 Vict. c. 26), the short contents of which Act are as follows:—

I. As to the property devisable or bequeathable:

All real estates (whether legal or equitable) that are descendible, whether then already possessed or afterwards acquired;

All customary or copyhold estates (whether legal or equitable) that are descendible, whether then already possessed or afterwards acquired;

All estates *pur autre vie*;

All personal estate;

All contingent, reversionary, and future interests in real or personal estate, whether already created or not;

All rights of entry.

II. As to the capacity of testators:

(1.) Persons under twenty-one years have no such capacity, even for the purpose of exercising a power expressed to be exercisable during minority, and the subsequent attainment of twenty-one years will not validate the will (Sugd. R. P. Stat. 330);

(2.) Married women have a limited capacity, that is to say, to the extent of exercising any power over real or personal estate, or to the extent that their husbands authorize them to dispose of their personal estate, or to the extent of property (real or personal) settled to their separate use. *Thomas v. Jones*, 2 J. & H. 475.

III. As to the formal requisites of wills:

(1.) Writing; whether in ink or in pencil (*Gregory v. Queen's Proctor*, 4 No. Ca. 623; *Bateman v. Pennington*, 3 Moo. P. C. 227); and whether or not in testamentary form (*Thorncroft*

WILLS—continued.

v. Lashman, 2 Sw. & Tr. 479); and the writing of the will may, by reference, incorporate other then existing documents (*Allis v. Maddock*, 11 Moo. P. C. 427);

(2.) Signature by testator, or by some other person by his direction and in his presence, at the foot of the will (15 & 16 Vict. c. 24); the testator's mark is a sufficient signature, whether he can or cannot write, even though his name is not affixed to the mark (*Re Bryce*, 2 Cur. 325); and even an impressed facsimile is sufficient (*Jenkins v. Salsford*, 3 Sw. & Tr. 93); and signature by initials is good (*Re Wingrove*, 15 Jur. 91); a witness may sign the testator's name for him (*Re Bailey*, 1 Cur. 914);

(3.) Presence of two witnesses at one and same time, being time that testator signs personally or by proxy;

(4.) Attestation of witnesses in the presence of the testator, although not necessarily in each other's presence, but no form of attestation is required (*Bryson v. White*, 2 Rob. 315); although the full attestation clause is useful, obviating the necessity of proof of the formalities of execution (*Re Diaper*, 3 N. E. 215);

(5.) Subscription of witnesses in the presence of the testator, although not necessarily in each other's presence; but the witness's mark is a sufficient subscription whether he can or cannot write (*Re Amies*, 2 Rob. 116); and a subscription by initials is good (*Re Christian*, 2 Rob. 110); since the 20 & 21 Vict. c. 77, s. 33, the execution of the will may be proved by one only of the attesting and subscribing witnesses (*Belbin v. Skeate*, 1 Sw. & Tr. 148);

(6.) In the special case of wills executing powers, if the power is to be exercised by writing under seal, and a will is used for the purpose of executing it, the will must be sealed in addition to the observance of the formalities before mentioned (*West v. Ray*, Kay, 385); and generally all other extra formalities required by the donor of the power, not being forma-

WILLS—continued.

lities of execution or of attestation, however whimsical, must be complied with, notwithstanding a 10 of the Wills Act, which relates only to execution and attestation;

- (7.) No publication of a will is necessary, other than such publication as consists in the observance of the formalities before mentioned, s. 13.

IV. As to the capacity of witnesses:

- (1.) The incompetency of an attesting witness is not to invalidate the will, whether such incompetency existed at the time of the testator's execution of the will or at any time afterwards (s. 14);
- (2.) A gift, whether by devise or bequest, to a witness, or to the then existing wife or husband of a witness, is not to affect the competency of the devisee or legatee as a witness (s. 15); but the gift is to be void, unless in the case of a creditor (ss. 15, 16);
- (3.) An executor of the will may be a witness (s. 17)

V. As to revocation of will:

- (1.) In the general case, and also in the case where the will is in exercise of a power of appointment over property which would in default of appointment devolve upon the real or personal representatives of the donee of the power, the marriage of the testator, whether male or female, revokes the will, the marriage being a legal marriage (*Re Mette*, 7 W. R. 543);
- (2.) In the case where the will is in exercise of a power of appointment over property which would not in default of appointment devolve upon the real or personal representatives of the donee of the power, the marriage of the testator, whether male or female, does not revoke the will (*Hawksley v. Barrow*, L. R. 1 P. & M. 147);
- (3.) Revocation by presumption is abolished (s. 19);
- (4.) Revocation may also be by subsequent will or codicil, being well executed, and the testator acting on that assumption (*Re R. L.*, 29 L. T. 26);
- (5.) Revocation may also be by the burning, tearing, or otherwise destroying the will, with the intention of thereby revoking it (*Re Kennell*, 2 N. R. 461);

WILLS—continued.

and such burning, tearing, or other destruction may be either by the testator personally, or by any other person in his presence acting by his direction; such revocation may be in part only (*Christmas v. Whynates*, 11 W. R. 371); but if the part cut out or destroyed is the signature of the testator, the revocation is of the whole will (*Walker v. Armstrong*, 4 W. R. 770); but the mere cancelling of the signature is nothing (*Stephens v. Taprell*, 2 Cur. 458); the codicil shares the fate of the will, in the absence of an intention that the codicil should operate substantively (*Grimwood v. Cozens*, 5 Jur. (N.S.) 497); where the will has been destroyed or lost *sine animo revocandi*, a copy of it will be admitted to probate (*Brown v. Brown*, 8 El. & Bl. 886);

- (6.) Revocation may be partially effected by means of interlineations, or by means of obliterations, or by means of other alterations generally, made in the will after execution, provided such interlineations, obliterations, or other alterations are executed as a will (s. 21);
- (7.) Revocation by alteration of estate is abolished (s. 23);
- (8.) A revoked will may be revived by the re-execution of the will, or by a codicil duly executed with the intention of reviving it, (s. 22; *Marsh v. Marsh*, 35 L. T. 523); therefore a will revoked by a revoking instrument would not be revived by the revocation of the latter instrument. *Major v. Williams*, 3 Cur. 432; *Wood v. Wood*, L. R. 1 P. & M. 309.

VI. As to operation of will:

- (1.) With reference to the real and personal estate comprised in it, a will operates from the death of the testator (s. 24); but that only in the absence of a contrary intent;
- (2.) With reference to matters other than the property comprised in it, a will operates from the date of the execution (*Re Wollaston*, 9 Jur. (N.S.) 727; *Bullock v. Bennett*, 7 De G. M. & G. 283; *Trimmell v. Fell*, 16 Beav. 539; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Noble v. Willock*, W. N. 1873, p. 124; 21 W. R. 711);

WILLS—continued.

- (3.) With reference to lapsed and void devises, these are included in the residuary devise (if any) (s. 25) (*see LAPSE*);
- (4.) With reference to the distinctions of property in land, as being freehold, leasehold, copyhold, or customaryhold, a devise of lands generally is to include lands of all those four qualities, whether or not the testator has also freehold lands;
- (5.) With reference to the distinction between ownership and power of appointment, a general devise of real estate is to include real estate over which the testator has a general power of appointment; and it has been decided that a power may be exercised subsequently even to the date of the execution of the will, if the instrument which creates the power comes into operation in the testator's lifetime (*Stillman v. Weedon*, 16 Sim. 261), but not when it comes into operation after his death (*Jones v. Southall*, 32 Beav. 31);
- (6.) In the absence of words of limitation, or of other words indicating a contrary intention, a beneficial devise is to pass the fee simple or other the whole estate of the testator (s. 28); and the same rule is extended to the case of devises to trustees (s. 30); and the fee simple estates of trustees are not to be determinable upon the purposes of the trusts being satisfied (s. 31);
- (7.) An estate tail given to any devisee who predeceases the testator, but leaves inheritable issue who survive the testator, is not to lapse, but to take effect in the predeceasing devisee (s. 32) (*see title LAPSE*);
- (8.) A devise or bequest to any child of the testator is to take effect in such child, notwithstanding he may die before the testator, provided any of his issue survive the testator (s. 33) (*see title LAPSE*);
- (9.) The phrase "dying without issue," and like phrases, formerly construed to give an estate tail by implication, are deprived of that effect (s. 29); and
- (10.) The Act is to extend to the wills of all persons executed or ex-

WILLS—continued.

published on or after the 1st of January, 1838.

The stat. 1 Vict. c. 26, does not extend to aliens (*Sugd. R. P. Stats.* 331), nor to British subjects not domiciled in England (*Bremer v. Freeman*, 10 Moo. P. C. 307), but the latter restriction has been partially removed by the 24 & 25 Vict. c. 114, and the former restriction is now altogether removed by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2, subject to the question of domicile.

See also titles DEVISES; LEGACIES.

WINDING-UP. This phrase means simply squaring the accounts of a partnership or company with a view to the dissolution of the same. Usually, partnerships and companies are wound up only when they are in insolvent circumstances, and such winding-up is most commonly held under the supervision of the Court of Chancery, which Court acts in the matter of the winding-up of companies under the provisions of the statutes 25 & 26 Vict. c. 89 (the Companies Act, 1862) and 30 & 31 Vict. c. 131 (the Companies Act, 1867). When an order has been made for the compulsory winding-up of a company, and even in the case of a voluntary winding-up, the Court of Chancery will stay actions by creditors against the company (*In re Keynsham Company*, 33 Beav. 123; *In re Life Association of England*, 34 L. J. (Ch.) 618). A winding-up is usually carried out by means of a liquidator, who (as the name denotes) liquidates, *i.e.*, ascertains the assets and liabilities of the company, with a view to the discharge of the latter by the former, so far as they go. *See* Buckley on the Companies Acts.

WITCHCRAFT. A practice for which in former times persons might have been and often were, condemned to death, even upon their own confession (*see* Best on Evidence, Criminal Confessions). The rule of the Mosaic Law was,—"Thou shalt not suffer a witch to live;" and the Civil Law also punished with death sorcerers and witches. By the English Law, witchcraft was at one time (under 33 Hen. 8, c. 8) a felony without benefit of clergy; and a severity continued in the Act 1 Jac. 1, c. 12; but at the present day under the stats. 9 Geo. 2, c. 5, and 56 Geo. 3, c. 138, no prosecution for witchcraft is for the future to be carried on; but the PRETENSE of witchcraft is made a misdemeanor punishable with a year's imprisonment and hard labour.

WITENAGEMOTE. An assembly of wise men, used distinctively to denote the Parliament of Anglo-Saxon times.

See title PARLIAMENT.

WITHERNAM: See title *CAPIAS IN WITHERNAM*.

WITHOUT DAY: See title *SINE DIE*.

WITNESSES. These are a means or instrument of evidence, and are persons who inform the tribunals regarding matters of fact. Generally, all persons are compellable to give evidence excepting only the sovereign; but witnesses may object to answer particular questions, being chiefly questions which tend to criminate or to expose to penalties or forfeitures, but not (unless where the judge interposes) questions tending to bring the witness into disgrace or ridicule, or to render him liable to merely civil proceedings.

A distinction is taken between the competency and the credibility of witnesses, the former determining absolutely the admission or rejection of their evidence, the latter going to corroborate or to impugn its truthfulness. At the present day, all objections to witnesses (with one exception) go to the credibility of their testimony and not to their competency, the *stats.* 14 & 15 Vict. c. 99, and 32 & 33 Vict. c. 68, having rendered even the parties to an action of whatever sort competent and also compellable to give their testimony. The one exception referred to, is that in criminal proceedings a husband is not compellable to give evidence against his wife, or the wife against her husband, these twain being one flesh.

However, for various reasons a person may not be competent to take an oath, and therefore may never fall under the category of witness at all, so that neither the question of his competency nor that of his credibility may come into question. Thus, from want of understanding, whether innate deficiency (as in the case of idiots) or extreme immaturity (as in the case of children of very tender years), or, *semble*, atheism, a person is incompetent to take an oath (see title *OATH*), and is therefore excepted from the class of witness, excepting that an atheist may now make a solemn affirmation, and a child may on examination on the *voir dire* (see that title) be found to be conscious of the sanctity of an oath.

The principal grounds for suspecting the credibility of a witness (as distinguished from his competency) are pecuniary interest, sexual relationship, social connections, self-regarding sentiments, and the feeling of sympathy with others.

Usually the method of dealing with witnesses is for the party on whose behalf they are called to examine them in chief, then for the opposite party to cross-examine them, and finally for the chief examiner to re-examine them. The object of the exami-

WITNESSES—continued.

nation-in-chief is to obtain facts in support of the case of the plaintiff; the object of the cross-examination is to impugn or throw discredit upon that first examination; and the object of the re-examination is to undo the prejudice which may so have been occasioned in the cross-examination.

See also titles *EVIDENCE*; *PROOF PER TESTES*; *SUBPOENA AD TESTIFICANDUM*; *STATUTE OF FRAUDS*, &c.

WORKHOUSES: See *POOR*.

WRECK. Such goods as after a shipwreck are cast up by the sea and left there within some county. By the Common Law all wrecks belonged to the Crown; but it was usual to seize wrecks to the king's use only when no owner could be found. The Common Law was modified by statute in the reign of Henry I., who granted that if any person escaped alive out of the ship it should be no wreck; and afterwards by the Statute of Westminster the First (3 Edw. 1) c. 4, if a man or dog or cat escaped alive the goods shall be no wreck, but the sheriff shall keep the same (or, if perishable, their value) for a year and a day, in order to restore them to the rightful owner, or his representatives establishing their claim to them. And by the statute 27 Edw. 3, c. 13, if a ship is lost on the shore and the goods come to land, they are to be at once returned to the owners, they paying a reasonable reward for their *salvage* (see title *SALVAGE*). By the *stat.* 7 & 8 Geo. 4, c. 29, plundering any vessel in distress or wrecked is made felony punishable with death. If for a year and a day no one claims wreck, it still belongs to the king as before.

See also titles *FLOTSAM* and *JETSAM*.

WRIT. This word is from the Saxon *writan*, to write; it is translated by *breve* in the Latin forms. In general a writ is the king's precept in writing under seal issuing out of some Court and commanding something to be done touching a suit or action, or giving commission to have it done. *Les Termes de la Ley*.

Writs in civil actions were either original or judicial. Original writs issued out of the Court of Chancery for summoning a defendant to appear, and were granted before the suit was begun, to begin the same, whence the name; judicial writs issued out of the Court where the original was returned after the suit was begun. The original bore date in the name of the king, the judicial in the name of the judge. Another division of writs was into *real*, *personal*, and *mixed*; the real concerning the possession of land, and being either

WRIT—continued.

writs of entry or writs of right, the personal concerning goods, chattels, and personal injuries, and the mixed partaking of the nature of both. Again, writs concerning the possession of land were either *possessory*, of a man's own possession, or *ancestral*, of the seisin and possession of his ancestor as well. Writs also commonly bore some special name or addition descriptive of their particular purpose, *e.g.*, writ of assistance, of inquiry, of *capias*, &c.

Writs original have been abolished, and all personal actions are now to be commenced by writ of summons (1 & 2 Vict. c. 110); also, all the real and mixed writs have been abolished (3 & 4 Vict. c. 17; C. L. P. Act, 1860), and ejectment itself even is now commenced by an ordinary writ of summons. For the varieties of the writ of summons, and also for the other varieties of now existing writs, see the respective titles, and in particular title **SUMMONS**, **WRIT OF**.

WRIT OF RIGHT. This was a writ which lay for a man who had the right of property against another man who had the right of possession and was in possession under such right. This severance of the two rights arose in three cases chiefly:—

- (1.) Upon discontinuance by tenant in tail;
- (2.) After judgment in a possessory action; and
- (3.) After the possessory action was barred by the Statute of Limitations.

The writ of right properly lay only to recover corporeal hereditaments for an estate in fee simple; but there were other writs said to be "in the nature of a writ of right" available for the recovery of incorporeal hereditaments or of lands for a less estate than a fee simple.

In this action, the demandant alleged some seisin of the lands in himself, or else in some one under whom he claimed; and usually the tenant in possession denied the demandant's right, which the latter was thereupon required to prove; and failing such proof, the demandant and his heirs were perpetually barred of his claim, otherwise he recovered the lands against the tenant and his heirs for ever. There was a limit to the seisin which the demandant might allege; and such limit was fixed by the Statute of Westminster the First (3 Edw. 1), c. 39, from the time of Richard I.; and afterwards by the stat. 32 Hen. 8, c. 2, seisin in a writ of right was to be alleged within sixty years.

By the stats. 3 & 4 Will. 4, c. 27, s. 36, and C. L. P. Act, 1860, s. 26, all writs of right and writs in the nature thereof have been abolished.

WRIT OF RIGHT OF ADVOWSON: See title **QUARE IMPEDIT**.

WRIT OF RIGHT OF DOWER: See title **DOWER**.

WRIT OF RIGHT OF WARD: See title **INFANTS**.

WRITING. This word usually denotes any instrument in the nature of an agreement under hand only.

See title **AGREEMENT**.

WRONG: See title **TORT**.

Y.

YARD. An enclosed space of ground generally attached to a dwelling-house.

YEA AND NAY. Yes and No; according to a charter of Athelstan, the people of Ripon were to be believed in all actions or suits upon their *yea* and *nay*.

YEAR. The year, as divided by Julius Caesar, consists of twelve months. It appears that in early English times the year began with Christmas Day; but as from the reign of William I. the year is designated by that of the reign only. Upon the Reformation of Religion the year was made to begin with the 25th of March, being the day of the feast of the Annunciation, but the year of the reign continued to be the common mode of denoting dates until the Commonwealth, when the year of our Lord came into use; and ultimately, by the 24 Geo. 2, c. 23, it was enacted that the 1st of January next following the last day of December, 1751, should be the first day of the year 1752, and so on for the first day of every succeeding year; and that the then 2nd of September, 1752, should continue to be reckoned as the second, but the next succeeding day (which of right would be the 3rd of September, 1752) should be reckoned as the 14th of September, 1753, omitting for that time only the eleven intermediate days. And all writings after the 1st of January, 1752, were to be dated according to the new style.

See also title **TIME**.

YEAR AND DAY. This period was fixed for many purposes in law. Thus, in the case of an *estray*, if the owner did not claim it within that time, it became the property of the lord. So the owners of wreck must claim it within a year and a day. Death must follow upon wounding within a year and a day if the wounding is to be indicted as murder. Also, a year and a day was given for prosecuting or avoiding certain legal acts, *e.g.*, for bringing actions after entry, for making claim, for avoiding a fine, &c.

YEAR, DAY, AND WASTE. It was formerly a part of the king's prerogative to take the profits of the lands of felons for a year and a day, and to make waste of the same lands, unless the lord of the felon redeemed the king's waste. But the king was restricted of this right of waste by Magna Charta, 9 Hen. 3, c. 22, and after taking the profits for a year and a day, he was to deliver them over to the lord. This prerogative of the king was abolished altogether by the stat. 54 Geo. 3, c. 145, which enacted that no future attainder for felony, except in cases of high treason or murder, should extend to the disinheriting of any heir, or to the prejudice of the right or title of any person other than the right or title of the offender himself during his life.

YEAR-BOOKS. Reports in a regular series from the reign of King Edward II. inclusive to the time of Henry VIII., said to have been taken by the prothonotaries or chief scribes of the Court at the expense of the Crown; they were published annually, whence their name.

YEARS, LEASES FOR. See title LEASES.

YEOMAN. A grade of society next in order to that of *gentleman* (6 Ric. 2, c. 4, and 20 Ric. 2, c. 2). The word etymologically means a common man, *i.e.*, *commoner*. Yeoman also designates an officer of the Queen's household, holding a middle place between serjeant and groom. Also, there are yeomen of the Queen's guard, being a body of soldiers first established in the reign of Henry VIII.

YEOMANRY : See title VOLUNTEERS.

YEW. A tree of which bows were commonly made for warfare; whence the tree was commonly planted in the churchyards, to ensure its protection.

YIELDING AND PAYING. The phrase which commonly expresses the reservation of rent in a deed of lease.

YULE. A north country word for

YULE—*continued.*

Christmas. The word is still in common use in Scotland, and is part of the local dialect.

Z.

ZEALOT. This word is commonly taken in a bad sense, as denoting a separatist from the Church of England, or a fanatic.

ZEALOUS WITNESS. When a witness is over-zealous on behalf of his party, the counsel who calls him ought to interrogate him with an appearance of indifference, to repress the witness's readiness to give evidence, and to prevent him from diminishing the effect or weight of his testimony; and he ought to dismiss him so soon as he has obtained all the evidence that he wants from him. Of such a witness Quintilian says,—“*Nec nimium instare interrogationi [debet], ne ad omnia respondendo testis fidem suam minuat; ac in tantum evocare eum, quantum sumere ex uno satis sit.*” Best's Evidence, 819. Over-zeal in a witness is clearly a matter affecting his trustworthiness. Tayl. Evid. p. 70.

ZOLLVEREIN. Is the name of the trade-league constituted by twenty-five of the states of the German Empire, until recently of the German Confederation. It comprises the kingdoms of Prussia, Bavaria, Saxony, Hanover, and Wurtemberg, together with one electorate (Hesse), three grand duchies, seven duchies, seven principalities, one landgraviate, and the city of Frankfort-on-the-Main. These states have agreed upon a general system of law with regard to commerce, the effect of which is to override the particular laws of the particular states, excepting where the general law is silent. See the Convention with regard to Letters Patent, dated the 21st of September, 1842, and ratified the 29th of June, 1843. (Johnson's Patentees' Manual, p. 356.) And see Wheaton's International Law, 70, 78 (n.)

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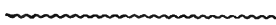
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THE LAW

RELATING TO

SHIPMASTERS AND SEAMEN.

*THEIR APPOINTMENT, DUTIES, POWERS, RIGHTS,
LIABILITIES AND REMEDIES.*

By JOSEPH KAY, M.A., Q.C.,

OF TRIN. COLL. CAMBRIDGE, AND OF THE NORTHERN CIRCUIT;
SOLICITOR-GENERAL OF THE COUNTY PALATINE OF DURHAM; ONE OF THE JUDGES OF THE COURT OF
RECORD FOR THE HUNDRED OF SALFORD;
AND AUTHOR OF "THE SOCIAL CONDITION AND EDUCATION OF THE PEOPLE
IN ENGLAND AND EUROPE."

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